Making the digital markets act more resilient and effective

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RECOMMENDATIONS PAPER

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MAKING THE DIGITAL MARKETS ACT MORE RESILIENT AND EFFECTIVE

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FIRST ISSUE PAPER
GATEKEEPER DEFINITION AND DESIGNATION

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1 Introduction

This paper focuses on the scope and the gatekeeper definition and designation in the DMA.

The paper is divided into four sections: after this introduction, Section 2 summarises the process to determine the gatekeeper platforms which are subject to regulation. Then, Section 3 deals with the scope of the DMA, i.e. the definition of the Core Platforms Services. Afterwards, Section 4 elaborates on the criteria and the indicators to designate the gatekeeper of those Core Platforms Services.

The proposals contained in this paper arise from discussions amongst CERRE academics and are intended to promote debate between participants at the private seminar series organised by CERRE.

2 Trigger for intervention in the DMA

The **DMA Proposal foresees the following steps to determine the digital services and firms which are subject to the obligations and prohibitions** foreseen in the Act.

First, the scope of the DMA is limited to eight types of digital services or business models, named ***Core Platforms Services*** (CPS). [1] They are often (but not always) intermediation services and, according to the Commission, share the following characteristics: extreme economies of scale and scope, important network effects, multi-sidedness, possible user lock-in and absence of multi-homing, vertical integration and data driven advantages. Those characteristics are not new in and of themselves, but when they apply cumulatively, they lead to market concentration, as well as dependency and unfairness issues which cannot be addressed effectively by existing EU laws. The boundaries of those services determine the scope of the DMA and, at the same time, the trigger of intervention *at the services level*. Those boundaries are defined legally directly in the DMA (or other EU laws) and, therefore, litigations regarding those boundaries should be resolved through a legal interpretation of those definitions.

Second, the trigger of intervention *at the firms level* is determined by the more economic concept of ***gatekeepers***. As explained below, gatekeeper power is based on three cumulative criteria: (i) a significant impact on the EU internal market; (ii) control of an important gateway for business users to reach end-users; and (iii) entrenched and durable position. This gatekeeper position is presumed to be held when a CPS provider has an important financial and geographical size for all its operations (CPS and other services alike) and when many EU end-users and business users are relying on the CPS. However, as size does not necessarily give gateway power, the CPS provider may rebut the presumption with several quantitative and qualitative indicators and show that, although it is big and with many users, business users are not dependent on it to reach end-users.

On the one hand, the gatekeeper designation is made on an individual firm and individual CPS basis: it only concerns the CPS(s) for which the firm meets the three criteria test to be designated as gatekeeper, to the exclusion of other CPSs offered by the same firm and *a fortiori* of other digital services outside the CPS list. [2] For instance, if Facebook holds a gatekeeper position for social network services, that does mean that Facebook will also be designated as a gatekeeper for its marketplace services. On the other hand, the gatekeeper designation covers all the commercial services with are included in the legal CPS for which a designation has been made. However, we think that the Commission should be able to exclude some commercial services within a CPS in an Article 7 specifications decisions.

It is instructive to contrast this DMA process to determine the trigger of intervention with the process used in other economic laws whose objectives are close to those of the DMA (see Table 1

[1] Indeed, those types of digital services are also referred by the Commission as 'business models': Commission Staff Working Document of 25 May 2016, Online Platforms, SWD(2016) 172. Such concept is similar to the concept of Areas of Business (AoB) proposed by BEREC: BEREC Response of September 2020 to the Public Consultations on the Digital Services Act Package and the New Competition Tool, BoR (20) 138, p.19.
[2] DMA Proposal, Art.3(7) and rec 29.

below). In its advice for a new pro-competition regime for digital markets, the **Digital Markets Taskforce of the UK CMA** proposes the following steps.[3] The new rules should apply to ***digital activities*** defined as "collections of products and services supplied by a firm that has a similar function or which, in combination, fulfil a specific function".[4] Then, the trigger at the firms level is determined by the economic concept of ***Strategic Market Status*** (SMS) based on two criteria: (i) substantial, entrenched market power in at least one digital activity (ii) providing the firm with a strategic position because the market power is particularly widespread or significant (for more, see the annex of this issues paper).

The **EU telecommunications regulatory framework** applies to two categories of digital services, electronic communications networks and services. [5] For the asymmetric economic regulation, the trigger of intervention at the services level is determined by ***relevant antitrust markets which meet a three-criteria test*** indicating that competition law is not effective to solve market power issues identified on those markets.[6] Then, the trigger for intervention at firms' level is determined by the presence of ***Significant Market Power*** (SMP) which is equivalent to dominance in competition law.[7]

Finally, the scope of **competition law** covers all economic activities. The trigger for intervention at the services level is determined by the definition of the ***relevant markets*** based on the SSNIP economic methodology.[8] Then, the trigger for intervention at the firms level is determined by the presence of a ***dominant position*** on those relevant markets which is defined as a position of economic strength affording the firm the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.[9]

	DMA Proposal	CMA Advice	EU Telecommunications Regulation	EU Competition law (Art. 102 TFEU)
Scope	8 Core Platforms Services (CPS)	Digital activities	Electronic networks and services	All economic activities
Trigger for intervention: services level	*Idem scope*	*Idem scope*	- Relevant market - Susceptible to ex-ante regulation : three criteria test	Relevant market
Trigger for intervention: firms level	Gatekeeper position	Strategic Market Status (SMS)	Significant Market Power (SMP)	Dominant position

Table 1: Comparing the intervention trigger of the DMA with other economic laws

Interestingly, the **DMA** (and the CMA Advice) **rely on economic analysis to determine the gatekeeper power** (or the SMS status) **without being constrained by the rigidities of**

[3] CMA, Advice of the Digital Markets Taskforce on a new pro-competition regime for digital markets, December 2020.
[4] *Ibidem*, para. 4.15.
[5] For an interesting comparison between the DMA and the EU telecommunications regulation, see P. Ibáñez Colomo, The Draft Digital Markets Act: a legal and institutional analysis, January 2021, available at SSRN.
[6] Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, OJ [2018] L 321/36, art.64 and Commission Recommendation 2020/2245 of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation, OJ [2020] L 439/23. The three criteria test are: (i) high and non-transitory structural, legal or regulatory barriers to entry are present; (ii) a market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based competition and other sources of competition behind the barriers to entry; (iii) competition law alone is insufficient to adequately address the identified market failure(s).
[7] EECC, art. 63 and Commission Guidelines of 27 April 2018 on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services, OJ [2018] C 159/1.
[8] Commission Notice on the definition of the relevant market for the purposes of Community competition law, O.J. [1997] C 372/5
[9] Guidance of 3 December 2008 on the Commission's Enforcement Priorities in Applying Articles [102 TFUE] to Abusive Exclusionary Conduct by Dominant Undertakings O.J. [2009] C 45/7.

competition law methodologies.[10] In particular, a relevant market definition can introduce an element of rigidity that might impair the effectiveness of the DMA: it results in a snapshot view of markets, and the EU practice tends to define narrow markets. Competitive phenomena that might occur outside of or beyond the relevant market(s) have proven difficult to introduce into the analysis at the market assessment stage.[11]

This is all the more critical as the DMA deals with structural competition problems in dynamic markets, where part of the competitive game involves reshaping markets through disruptive innovation, for instance.[12] Indeed, the very rationale for the DMA is to bridge gaps in the coverage of competition law, some of which arise as a consequence of rigidities induced by relevant market definition.[13]

3 Services susceptible to ex-ante regulation: Core Platform Services

3.1 The Commission's proposal

The scope of the DMA proposal covers the following closed list of eight (seven principal and one accessory) digital services which are named "Core Platforms Services" (CPS):[14]

- ***Online B2C intermediation services*** which are defined as "information society services[15] that "(i) allow business users to offer goods or services to consumers, with a view to (ii) facilitating the initiating of direct transactions between business users and consumers regardless of whether the transaction is finally concluded offline or online and which (iii) provide services to business users, based on contractual relationships between the platform and the business user."[16] As the first part of the definition refers to consumers (and not end-users), intermediation services do not include B2B intermediation services. This type of CPS includes:
    - ***Marketplaces*** which are defined as "information society services allowing consumers and/or traders to conclude online sales or service contracts with traders either on the online marketplace's website or on a trader's website that uses computing services provided by the online marketplace";[17] given this broad definition, it seems to include general marketplaces like Amazon and specialist marketplaces like Apple Books;

[10] On the difficulties of applying competition law methodologies to the platform economy, see for instance J.U. Franck and M. Peitz, *Market definition and market power in the platform economy*, CERRE Report, 2019.
[11] By way of example, see how the relevant market definition exercise prevents the Commission from perceiving what is truly at stake in *Facebook/WhatsApp*, namely the acquisition of one of the most likely springboards for disruptive innovation by the very powerful platform: Decision of the Commission of 3 October 2014, Case M.7217 *Facebook/WhatsApp*. See also LEAR, Ex-post Assessment of Merger Control Decisions in Digital Markets (2019) Study for the Competition and Markets Authority; Fletcher, Chapter 8 cautioning against the reliance on rigid market definition in the digital sectors.
[12] P. Larouche, Platforms, Innovation and Competition on the market, *Competition Policy International* 2020.
[13] In that respect, one could argue that the DMA would merely follow the trend already underway in merger control, where the horizontal guidelines in both the US and the EU put forward analytical methods that reduce the need for market definition to carry out a conclusive assessment in cases of monopolistic competition (markets with significant product differentiation amongst competitors).
[14] DMA Proposal, art.2(2) and Impact Assessment, pp.39-45. In its Response to the Public Consultations on the Digital Services Act Package and the New Competition Tool, BoR (20) 138, p.19, BEREC had identified 5+1 digital services: (i) app stores, (ii) e-commerce, (iii) general search, (iv) operating systems and (v) social media and advertising services.
[15] An Information Society Services a service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient: Directive 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ [2015] L 241/1.
[16] Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ [2019] L 186/55, art.2(2).
[17] Directive 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union [2016] OJ L194/1, art.4(17).

- ***App stores*** which are defined as "a type of online intermediation service, which is focused on software applications as the intermediated product or service";[18] they include Apple App store or Google Play store.

- ***Online search engines*** which are defined as "information society services allowing users to input queries to perform searches of, in principle, all websites, or all websites in a particular language, based on a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found"; [19] they include for instance Google search or Microsoft Bing. Given that the definition refers to searches of all websites, this CPS seems to exclude specialist searches.
- ***Online social networks*** which are defined as "platforms that enable end-users to connect, share, discover and communicate with each other across multiple devices and, in particular, via chats, posts, videos and recommendations";[20] they include for instance Facebook.
- ***Video-sharing platform services*** which are "services where the principal purpose or an essential functionality is the provision of programmes and/or of user-generated videos to the general public for which the platform does not have editorial responsibility but determines the organisation of the content";[21] they include for instance YouTube.
- ***Number-independent interpersonal communication services*** which are defined as "services that enable direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons (whereby the persons initiating or participating in the communication determine its recipient) and which does not connect with publicly assigned numbering resources;"[22] they include for instance WhatsApp, Skype or Gmail.
- ***Cloud computing services*** which are defined as "information society services that enable access to a scalable and elastic pool of shareable computing resources"; [23] presumably include Software as a Service (SaaS), IaaS and Platform as a Service (PaaS).
- ***Operating systems*** which are defined as "systems software which control the basic functions of the hardware or software and enables software applications to run on it"; [24] they include for instance Google Android, Apple iOS or Microsoft Windows. It remains to be clarified whether this CPS includes the OS underpinning browsers.
- ***Advertising services*** which are an accessory CPS because it will only be regulated when offered by a provider of any of seven principal CPS mentioned above, it includes ad networks, ad exchanges and any ad intermediation services such as Google Ads.

As explained above, the Commission selects those eight digital services because they have characteristics which lead to market concentration, as well as dependency and unfairness issues.[25] Based on such selection criteria, the Commission did not select:[26]

- ***Video streaming and video-on-demand services*** such as Netflix because of the lack of multisidedness,

[18] DMA Proposal, art.2.12.
[19] Network Information Security Directive, art.4(18).
[20] DMA Proposal, art.2.12.
[21] Directive 2010/13 of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ [2010] L 95/1, as amended by Directive 2018/1808, art.1(1aa).
[22] EECC, art. 2(5) and (7).
[23] Network Information Security Directive, art.4(19).
[24] DMA Proposal, art.2.10.
[25] In her Advice the CMA Digital Markets Taskforce recommends to initially prioritise the following 7 digital services: online marketplaces, app stores, social networks, web browsers, online search engines, operating systems and cloud computing services.
[26] See DMA Impact Assessment, paras. 128-130.

- Nor ***B2B industrial platforms*** because of the absence of strong bargaining power asymmetry which could lead to unfairness.

Moreover, the Commission did not select for regulation some **ancillary services** such as payment services, nor identification services.[27] However, the DMA proposal prohibits anti-steering towards ancillary services which compete with those of the gatekeeper as well as bundling between CPS and some ancillary services (such as identification services),[28] thereby promoting contestability for ancillary services provision. The DMA Proposal also grants access and interoperability rights to the providers of ancillary services, thereby contributing to their contestability.[29]
To ensure the resilience of the law in an economic sector which is fast-moving, the DMA proposal contains a **built-in dynamic mechanism** which allows the European Commission, after a so-called market investigation, to propose to the EU legislative bodies that the DMA be amended to include new digital services in the list of CPSs.[30] By implication, the list of CPSs is therefore considered to form an essential element of the DMA, since it can only be expanded through a legislative act (and not a delegated act as foreseen for the expansion of the obligations).[31] In the end, that market investigation mechanism to expand to the CPS list does not add much to the right of legislative initiative already entrusted to the Commission by the TFEU.[32] If anything, it constrains such right as it imposes to the Commission to do a market investigation before making the legislative proposal.

3.2 Recommendations

3.2.1 General definition and characteristics of Core Platform Services

Core Platform Services are not defined in the DMA proposal which merely contains a list of types of digital service, many of which are defined in other EU instruments. On the positive side, the DMA proposal seeks to build on existing legislative definitions and therefore avoids reinventing the wheel. Furthermore, the proposal does not rely on an antitrust market definition which may prove too rigid to deal with holistic issues in very dynamic sectors. On the negative side, these definitions were elaborated over many years, in instruments that are not always entirely consistent with one another: throwing them in the "core platform services" basket may not provide much guidance.

As already mentioned, **a general characterization of CPS can be found in the recitals of the proposal: core platform services feature economies of scale, negligible marginal costs, strong network effects, multi-sidedness, user dependency, lock-in, lack of multi-homing, vertical integration and data-driven competitive advantages.[33] This general definition could be included directly in Article 2 as a chapeau to the list**. Also, this general definition could focus more on the intermediation of the platform.[34]

3.2.2 The list of the Core Platform Services

Not all CPSs are two-sided and perform an intermediation function. **Some CPSs are inherently single-sided**. This is the case for number-independent interpersonal communication services as well as cloud computing services. Moreover, those two CPS are already subject to existing EU law that may address some of the concerns of the Commission. Number-independent interpersonal communication services are covered by the EECC and subject to transparency and interoperability obligations.[35] Cloud services are covered by the Free Flow of Data Regulation which encourages

[27] DMA Proposal, art.2.14 and 2.15.
[28] DMA Proposal, resp. art.5(c) and art.5(e).
[29] DMA Proposal, art.6.1(f).
[30] DMA Proposal, Art.17(a).
[31] Indeed Art. 290 TFEU provides that delegation is only possible for non-essential elements of the legislative act.
[32] TEU, Art.17(1)
[33] DMA Proposal, recitals 2 and 12
[34] OECD defines intermediation platform as "an information society service provider that facilitates interactions between two or more distinct sets of users (whether businesses or individuals) who interact through the service via the Internet": https://www.oecd.org/innovation/an-introduction-to-online-platforms-and-their-role-in-the-digital-transformation-53e5f593-en.htm
[35] BEREC Opinion of 11 March 2021 on the European Commission's proposal for a Digital Markets Act: For a swift, effective and future-proof regulatory intervention, BoR (21) 35, section 1.1; BEREC Draft Report, p.12.

codes of conducts to facilitate the porting of data and the switching between cloud providers.[36] Therefore, we **recommend that number-independent interpersonal communication services and cloud computing services should be treated in the same manner as advertising services. They should be considered as accessory CPS and be regulated only when they are provided by a digital platform which also provides another principal CPS**.

Besides, it seems that **several CPSs are in themselves essentially one-sided** because the other 'side' comprises another CPS. For instance, the other 'side' of a search engine are the websites that are crawled and that are presented alongside advertising services. A platform with both search and advertising functions can be seen as two-sided, and will have both multiple end users and multiple business users. But it is less obvious that this is true of each function considered in isolation. This may also be the case for social networks, video sharing platform services and operating systems.

4 Criteria and indicators to designate gatekeeper of Core Platform Services

4.1 The Commission's proposal

The DMA constitutes asymmetric regulation: its obligations do not apply to all providers of Core Platform Services, but only to those providers which have been designated as gatekeepers. Such designation is done by the European Commission based on a **cumulative "three criteria test"**, namely:

- *significant impact* on the EU internal market;
- control of an *important gateway* for business users to reach end-users;
- and *entrenched and durable* position.[37]

To facilitate and speed up the designation process, the DMA proposal establishes a **rebuttable presumption that the three-criteria test is met when a provider of CPS is above several size thresholds for a certain period** (in general 3 years). Those thresholds are the following:

- for the undertaking to which the CPS provider belongs, an annual turnover in the EEA equal or above €6.5bn or market capitalization of at least €65bn *and* the presence in at least three of the 27 Member States of the EU;
- and for the provided CPS, a reach of more than 45 million monthly active end-users in the EU (which represent 10% of the EU population)[38] as well more than 10,000 active business users on an annualised basis.[39]

The Commission will adopt a delegated act to specify the methodology for determining whether those quantitative thresholds are met and to regularly adjust them to market and technological developments.[40] In practice, a CPS provider should self-assess whether it meets those size thresholds and, when it does, it should notify the Commission, providing all the relevant information within three months.[41] On that basis, within two months the Commission designates this CPS provider as a gatekeeper, unless the provider tries to rebut the presumption.[42] The Commission

[36] Regulation 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union, OJ [2018] L 303/59, art.6.
[37] DMA Proposal, Art.3.1.
[38] The same criterion is proposed to designate the Very Large Online Platforms which are subject to additional obligation and a more Europeanised oversight under the DSA: DSA Proposal, art.25.2.
[39] DMA Proposal, art. 3.2 and rec. 23. The Commission could, in a delegated act, clarify the methodology to measure the size thresholds in order to ensure legal predictability and could also adjust the thresholds: DMA Proposal, art. 3.5.
[40] DMA Proposal, art.3(5).
[41] DMA Proposal, art.3(3).
[42] DMA Proposal, art.3(4) and art.15(3).

services Impact Assessment indicates that the use of those thresholds could result in the identification of 10 to 15 CPS providers but does not give any explanation for this range number.[43]

Indeed, as the size thresholds do not necessarily indicate a gatekeeper position, a **CPS provider which meets the thresholds can present sufficiently substantiated arguments to rebut the presumption** and demonstrate that the three-criteria test is not fulfilled.[44] Such rebuttal must rely on an open list of quantitative and qualitative indicators such as financial and commercial size, number of users, entry barriers, scale and scope effects, user lock-in and "other structural market characteristics". [45] Conversely, if based on the same indicators, a CPS provider does fulfil the three-criteria test despite falling under the presumptive thresholds, the Commission may designate that provider as a gatekeeper.[46]

Table 2 below summarises the three-criteria test to define gatekeeper power, the size thresholds for the gatekeeper presumption and the quantitative and qualitative indicators that can be used to rebut the presumption or to designate gatekeepers which are below the thresholds.

Three criteria test	Presumptive size thresholds	Quantitative and qualitative gatekeeper indicators
1. Significant impact on the internal market	***Financial and geographical size (at firm level)*** - Annual EEA Turnover (last 3 years) > € 6.5bn *or* Market cap (last year) > € 65 bn - *and* currently provides one CPS in at least 3 Member States	***Size, operation and position*** - Very high turnover derived from end-users of a single CPS - Very high market capitalisation - Very high ratio of equity value over profit - High growth rates, or decelerating growth rates read together with profitability growth
2. Important gateway to reach end-users	***User size (at CPS level)*** - Monthly EU active end-users > 45m - *and* yearly EU active business users > 10 000	***Number and type users*** - Number of end-users - Number of dependent business users - End-users or business users lock-in, lack of multi-homing
3. Entrenched and durable position	CPS user size is kept over the last three years	***Entry barriers*** - Network effects, data-driven, analytics capabilities - Economies of scale and scope (incl. from data) - Vertical integration
		Other structural market characteristics

Table 2: Criteria, thresholds and indicators to designate gatekeeper

Next to existing gatekeepers, the Commission may also designate an **emerging gatekeeper** when a CPS provider meets the two first criteria (i.e., significant impact and important gateway) and the

[43] Impact Assessment, para.148. Caffarra and Scott Morton calculated on a preliminary basis that the thresholds "will capture not only (obviously) the core businesses of the largest players (GAFAM), but perhaps also a few others. Oracle and SAP, for instance, would appear to meet the thresholds, as would AWS and Microsoft Azure. Conversely Twitter, Airbnb, Bing, LinkedIn, Xbox Netflix, Zoom and Expedia do not appear to meet the thresholds at present, and Booking.com, Spotify, Uber, Byte dance/TikTok, Salesforce, Google Cloud and IBM Cloud appear to meet some but not others": https://voxeu.org/article/european-commission-digital-markets-act-translation. However, Oracle and SAP do not appear to offer CPS as they do not operate B2C platforms and do not have separate business users and end-users.
[44] DMA Proposal, art.3(4).
[45] DMA Proposal, Art.3(6) and rec 25.
[46] DMA Proposal, Art.3(6) and Art.15. Three or more Member States may request the Commission to proceed with such designation.

fulfilment of the third criterion is foreseeable.[47] In this case, the emerging gatekeeper is subject to a subset of the obligations imposed on existing gatekeepers to prevent market tipping.

Contrary to the CMA Advice, the **three-criteria test does not explicitly mention market power nor dominant position**. There is thus no need to define an antitrust relevant market or to prove a dominant position to find a gatekeeper power. However, the second and third criteria implicitly include the presence of market power and several indicators to rebut the presumption are also linked to market power. This the case in particular for user lock-in or, more generally, the different types of entry barriers. It is also worth noting that the Commission could designate several gatekeepers providing the same CPS. Therefore, the competition law rationale that there is only one single dominance per market does not necessarily apply in the context of the DMA. On the one hand, a CPS is not necessarily a relevant market (e.g. operating system may include different relevant markets).[48] On the other hand, a gatekeeper power does not necessarily coincide with a dominant position (e.g., while a search engine may be one relevant market, two providers of large search engines meeting the thresholds may have a gatekeeper power while both may not have a dominant position).[49]

4.2 Recommendations

4.2.1 The three criteria test to define gatekeeper power

There is no clear **definition of gatekeeper** in EU law, although the concept has motivated antitrust and regulatory intervention. One example relates to access to technical services for digital TV which constituted a key capability for media firms. In *NewsCorp/Telepiu*, the Commission considered the merging parties would have been "the *gatekeeper* of a tool (Videoguard CAS) that may facilitate entry for any alternative pay DTH operator and of an infrastructure (the platform) that may ease the conditions for the broadcasting of pay and free TV satellite channels" and imposed compulsory access to those technical services as a condition to clear pay-TV merger .[50] To complement antitrust law, ex ante rules were also adopted to force the providers of Conditional Access Systems (CAS) from which broadcasters depend to reach any group of potential viewers to offer to broadcasters, on a FRAND basis, technical services enabling the broadcasters' digitally-transmitted services to be received by viewers.[51] Another example relates to interoperability. The EECC imposes on providers of number–independent interpersonal communications services the obligations to render their services interoperable if those providers reach a significant level of coverage and user up-take.[52] A definition of gatekeeper is given by Caffara and Scott Morton as "an intermediary who essentially controls access to critical constituencies on either side of a platform that cannot be reached otherwise, and as a result can engage in conduct and impose rules that counterparties cannot avoid."[53] The gatekeeper concept is also linked to different other concepts[54] such as:

[47] DMA Proposal, art.15(4), rec 27 and 63.
[48] In Google Android Decision, the Commission considered that Android and iOS are part of two different relevant markets.
[49] In practice, when there are two gatekeepers for the same CPS, this will often imply that the CPS is made of several separate antitrust relevant markets. For instance, this may the case for app stores (Apple and Google), marketplaces (eBay and Amazon) or social networks (Facebook and LinkedIn).
[50] Decision of the Commission of 2 April 2003, Case M.2876 *NewsCorp/Telepiu*, paras 198 and 225. When those access commitments could not have been obtained, mergers have been prohibited: Decisions of the Commission of 27 May 1998, Case M.993 *Beterlsmann/Krich/Premiere* and Case M.1027 *Deutsche Telekom/BetaResearch*. The merger was prohibited because it would have resulted in BetaDigital and BetaResearch having a dominant position on the German market for the supply of technical services for pay-TV, besides Premiere strengthening its dominance on the pay-TV market and Deutsche Telekom strengthening its dominance on the cable networks.
[51] EECC, art.62(1) and Annex II, Part I.
[52] EECC, art.61(2c).
[53] https://voxeu.org/article/european-commission-digital-markets-act-translation.
[54] P. Alexiadis and A. de Streel, *Designing an EU Intervention Standard for Digital Platforms*, EUI Working Paper-RSCAS 2020/14, pp.2-9; Geradin D. (2021), What is a digital gatekeeper? Which platforms should be captured by the EC proposal for a Digital Market Act?, available on SSRN, pp.4-11.

- **Bottleneck power** which is "a situation where consumers primarily single-home and rely upon a single service provider, which makes obtaining access to those consumers for the relevant activity by other service providers prohibitively costly".[55]
- **Unavoidable trading partner**, in the digital online platform context, the Cremer Report has already considered that classification as an unavoidable trading partner is usually associated with the existence of intermediation power.[56]
- **Economic dependency** which occurs "if and to the extent that the business faces a high cost from switching away from the platform to a substitute. Such switching costs can arise for instance if a business has made significant platform-specific investments, such as building its technology to be compatible with the platform's specification; these investments would have to be written down ("sunk costs") and new investments made if the business were to switch to a substitute. Switching costs can also arise from the fact that any substitutes are far inferior, such as when a single platform is a gatekeeper to a given market or market segment, and there are few other means of reaching that market or segment".[57]

The **three-criteria test proposed in the DMA are in line with the concept of gatekeepers or associated concepts** such as bottleneck, unavoidable trading partner or economic dependency. However, the test **may risk being over-inclusive**. This in turn may strain the monitoring and the enforcement process as well as negatively impact the relevance and the strengths of the prohibitions and obligations. In the CERRE Recommendation,[58] we had proposed the introduction of a fourth criteria consisting of the orchestration of an ecosystem.[59] We explained that this additional criteria could be assessed with the following indicators: presence in multiple markets or business areas which could be 'tightly' connected in the same vertical value chain or more 'loosely' connected, control of ecosystems as a web of interconnected and to a large degree interdependent economic activities carried out by different undertakings to supply one or more products or services which impact the same set of users. Under the current proposal, the orchestration of an ecosystem may play a role in the gatekeeper designation as it may increase the size of the platform (first criterion), its gateway power (the second criterion) or the entrenchment of such power (third criterion).[60] However, this may not be enough.

During the preparation of the proposal, the Commission services envisaged a **stricter test which would require the gatekeeper to provide at least two CPSs** (instead of merely one, as finally proposed).[61] This additional condition would have led to a more limited number of regulated platforms, estimated to be between 5-7 (instead of 10-15 under the DMA proposal). Such additional requirement has the advantage of focusing the DMA (and the limited resources for its enforcement) on the most obvious and pressing contestability issues. Indeed, as recognised in the DMA proposal: "as gatekeepers frequently provide the portfolio of their services as part of an integrated ecosystem to which third-party providers of such ancillary services do not have access, at least not subject to equal conditions, and can link the access to the core platform service to take-up of one or more ancillary services, the gatekeepers are likely to have an increased ability and incentive to leverage their gatekeeper power from their core platform services to these ancillary services, to the detriment of choice and contestability of these services".[62] However, some big platforms which are only

[55] F. Scott Morton, Bouvier, P., Ezrachi, A., Jullien, A., Katz, R., Kimmelman, G., Melamed, D. and J. Morgenstern, *Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee*, Stigler Center for the Study of the Economy and the State, 2019, p.105.
[56] J. Crémer, Y-A. de Montjoye and H. Schweitzer, *Competition policy for the digital era*, Report to the European Commission, March 2019. The ACCC Report refers to Google and Facebook as "unavoidable trading partners" for a significant number of media businesses, in the sense that they are important channels through which consumers access news, with many news businesses being dependent on them as key sources of referral traffic.
[57] Expert Group for the Observatory on the Online Platform Economy, Measurement & Economic, Indicators, 2020, p.17.
[58] CERRE Recommendation DMA, p.101.
[59] On the concept of ecosystem, see M.G. Jacobides, C.Cennamo and A.Gawer, "Towards a theory of ecosystems", *Strategic Management Journal* 39(8), 2018, 2255–2276; M.G. Jacobides and I. Lianos, Ecosystems and Competition Law in Theory and Practice, UCL Centre for Law, Economics and Society *Research Paper Series: 1/2021.*
[60] DMA Proposal, rec.3.
[61] DMA Impact Assessment, paras.148 and 388.
[62] DMA Proposal, rec.14.

providing one CPS will then escape regulation even though they may have the possibility to leverage their gatekeeper power on one CPS to other related services.

4.2.2 The thresholds to establish the gatekeeper presumption

The **reliance on size thresholds, which are relatively easy to determine for the Commission, as a rebuttable presumption for the meeting of three criteria test will incentivise the digital platforms to disclose** the quantitative and qualitative indicators for gatekeeper power that they know better than the Commission. However, it should be clear that **such presumption is only based on size and that size is not directly linked to gatekeeper power**. This is why it should be reasonably possible to rebut the presumption. In that regard the wording of the Impact Assessment which mentions that the gatekeeper presumption could only be rebutted in very exceptional circumstances is unfortunate.[63]

Another issue is that, in the Commission Proposal, the user threshold should be assessed at the CPS level and not at the firm level. As this threshold relates to end-users and business users, it may be difficult to apply in isolation to a CPS which is inherently single-sided (as noted above, number-independent interpersonal communication services and cloud computing services) because it is not a gateway between end-users and business users.[64] This double threshold may also be difficult to apply to a CPS which is essentially one-sided (as noted above, search engine social networks, video sharing platform services, operating Systems and advertising services). To deal with such difficulty, the **calculation of the end users and business users could be done for all the CPS in combination**. For the CPS which are accessory to principal CPS (such as advertising services in the Commission proposal and also communications services and cloud services in our recommendation), the user threshold should be calculated on the combination of principal and accessory CPSs.

4.2.3 The indicators to rebut the gatekeeper presumption

The list of quantitative and qualitative indicators that can be used to rebut the presumption – or to designate as gatekeeper firms that fall below the presumptive thresholds – are sound and broadly reflect the (admittedly limited) economic literature on gatekeepers or associated concepts. However, some improvements to the list are possible. One of the key indicators to assess the second criterion (*important gateway*) is **whether the platform controls a termination monopoly or a competitive bottleneck.[65] This depends on the ability and the incentive of the business users and the end users to multi-home across several competing platforms**.[66] Thus, it is regrettable that the absence of multi-homing is only mentioned in a recital (25) of the DMA Proposal and not in Article 3(6). Also to assess this second criterion, the **relative size of the platforms** compared to the other platforms providing the same CPS is an important indicator to look at.

One of the key indicators to assess the third criterion (*power entrenchment*) should be the presence of **entry barriers**. However, the different types of entry barriers could be clarified. **The first type is the entry barriers to existing services and will vary according to the business models of the digital platforms**. An important entry barrier consists of cross-group externalities and network effects which tend to be amplified by big data and AI technologies and increase with the development and the maturation of the markets. **A second type is entry barriers to future services and is related to the control of innovation capabilities**. In the digital economy, they may consist in control over data, key platform elements, risky and patient capital, specific data, and computer skills.[67]

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[63] DMA Impact Assessment, para.389.
[64] Note that DMA Proposal rec.13 *in fine* notes that: "In certain circumstances, the notion of end users should encompass users that are traditionally considered business users, but in a given situation do not use the core platform services to provide goods or services to other end users, such as for example businesses relying on cloud computing services for their own purposes."
[65] M. Armstrong, 'Network Interconnection', *Economic Journal* 108, 1998, 545-564; J.-J. Laffont and J. Tirole, *Competitions in Telecommunications*, MIT Press, 2000.
[66] Geradin, 2021; Cabral L., J. Haucap, G. Parker, G. Petropoulos, T. Valletti, M. Van Alstyne (2021), The EU Digital Markets Act A Report from a Panel of Economic Experts, Joint Research Center of the European Commission. PPMI et al., Multi-homing: obstacles, opportunities, facilitating factors, Study on "Support to the Observatory for the Online Platform Economy", 2021.
[67] CERRE Recommendation DMA, p.101.

Moreover, as the gatekeeper concept is new in EU law and the list of indicators proposed in the DMA remains open, the Commission could enhance legal predictability by adopting **guidelines on the manner it will use and assess those indicators**.[68] Those guidelines are often adopted in competition law and in some economic regulation to summarise past administrative practice and case law.[69] In this case, the situation is different as there is no existing practice and case law in the concept of gatekeeper.

4.2.4 Review cycle

A review cycle of two years for gatekeeper designation is very short given the logistical and fact-finding pressures it imposes upon the Commission (especially in the absence of assistance from national authorities) and the fact the timeline for potential competition assessment in antitrust is generally three years. **The cycle could be longer, for instance, five years** as it is provided for in the EU telecommunications regulation[70] or as it has been proposed in the CMA Advice to balance sufficient time for the effect of regulation to be observed, with the need to ensure the designation remains appropriate.[71]

[68] Also, Draft BEREC Report of 11 March 2021 on the *ex-ante* regulation of digital gatekeepers, BoR (21) 34, p.16.
[69] See for instance, Commission Guidelines of 27 April 2018 on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services, OJ [2018] C 159/1.
[70] EECC, art.67.5.
[71] CMA Advice, para.4.28.

Annex: Laws and proposals to the designation of digital platforms at national level

Next to the DMA, several countries have adopted or proposed trigger to impose additional obligations of the largest digital platforms.

Germany

The recently adopted 10th amendment to the Act against Restraints of Competition introduces the threshold of ***paramount significance*** determined based on five criteria:

- a *dominant* position on one or more markets;
- financial strength or access to other *resources*;
- vertical *integration* and activities on otherwise related markets;
- access to *data* relevant for competition;
- and importance of activities for *third parties' access* to supply and sales markets and related influence on third parties' business activities.[72]

France

The Autorité de la Concurrence proposed to introduce a threshold of ***structuring digital platforms*** defined as

- a company that provides online *intermediation* services for exchanging, buying or selling goods, content or services,
- which holds *structuring market power* because of its size, financial capacity, user community and/or the data that it holds,
- enabling it to *control access* to or significantly affect the functioning of the market(s) in which it operates with regard to its competitors, users and/or third-party companies that depend on access to the services it offers for their economic activity.[73]

The French telecommunications regulator ARCEP proposed a threshold of ***systemic digital platforms***, defined based on

- three main criteria: (i) the existence of *bottleneck* power; (ii) a certain *number of users* in the EU - or as a proxy, sufficiently high EU turnover; and (iii) the existing of integration of that firm into an *ecosystem* enabling leverage effects;
- which are complemented by four secondary criteria: (i) *gatekeeper* position; (ii) access to many high quality *data*; (iii) market shares for *online advertising*; and (iv) the *market value* of the platform.[74]

[72] See Section 19a of German Competition Law on Abusive Conduct of Undertakings of Paramount Significance for Competition across Markets. A non official English translation is available at: https://www.d-kart.de/wp-content/uploads/2021/01/GWB-2021-01-14-engl.pdf

[73] Autorité de la concurrence's contribution of 19 February 2020 to the debate on competition policy and digital challenges available at: https://www.autoritedelaconcurrence.fr/sites/default/files/2020-03/2020.03.02_contribution_adlc_enjeux_numeriques_vf_en_0.pdf

[74] ARCEP, *Systemic digital platforms*, December 2019.

United-Kingdom

The Advice of the Digital Market Taskforce of the CMA[75] proposes to regulate the firms with ***Strategic Market Status (SMS)*** which have

- *Substantial, entrenched market power* in at least one digital activity;
- providing the firm with a *strategic position* because the market power is particularly widespread or significant. This strategic position could be determined based on the following criteria: (i) firm has achieved *very significant size or scale* in an activity, for example where certain products are regularly used by a very high proportion of the population or where the value of transactions facilitated by a specific product is large; (ii) the firm is an *important access point to customers* (a gateway) for a diverse range of other businesses or the activity is an *important input* for a diverse range of other businesses; (iii) the firm can use the activity to *extend market power* from one activity into a range of other activities and/or has developed an '*ecosystem*' of products which protects a firm's market power; (iv) the firm can use the activity to *determine the rules of the game***,** within the firm's ecosystem and also in practice for a wider range of market participants; or (iv) the activity has significant impacts on markets that may have *broader social or cultural importance*.

[75] CMA, Advice of the Digital Markets Taskforce on a new pro-competition regime for digital markets, December 2020, paras. 4.7 to 4.24 and Appendix B: The SMS regime: designating SMS firms.

SECOND ISSUE PAPER
ARCHITECTURE

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1 The architecture of the Digital Markets Act

This paper addresses the 'architecture' of the Digital Markets Act.

In this paper, we first outline the key elements of the 'architecture' of the Act, with a specific focus on how obligations can be introduced and further specified by the Commission, and the implications which this may have for how they are enforced. These are the aspects of the proposals where we think there is most room for improvement, although we also make brief comments on the process for the designation of gatekeepers in this paper.

In some cases, there remain differences in view amongst the CERRE academic team. We indicate where that is the case.

2 The Commission's proposal

The Act proposes that gatekeepers will be designated and so be subject to regulation (concerning particular core platform services) if they satisfy the criteria of Article 3(1). This is presumed if they meet or exceed the quantitative thresholds in Article 3(2). The gatekeeper must notify the Commission that it meets the quantitative thresholds within 3 months and the Commission must then designate within a further 60 days.

The gatekeeper is also allowed to advance 'sufficiently substantiated' arguments as to why, despite meeting the quantitative thresholds, it does not meet the criteria of Article 3(1), and thus should not be regulated (either at all or concerning a particular core platform service). The Commission must then investigate the arguments, taking into account the elements listed in Article 3(6). The Commission is required to make its decision on the merits of these arguments within 5 months (Article 15(3)).

The Commission can also designate a gatekeeper that does not meet the quantitative thresholds in Article 3(2) after having undertaken a market investigation under Article 15. It is expected, but not obliged, to conclude this investigation within 12 months (and to notify its provisional findings to the firm in question within 6 months). In undertaking the investigation, the Commission must take into account the same elements in Article 3(6).

The Commission can change its decision to designate a gatekeeper concerning any core platform service at any time if circumstances require. It must also review each designation every 2 years (Article 4).

Gatekeepers designated under Article 3 must then comply with obligations which are specified in two Articles, Articles 5 and 6. The two sets of obligations are distinguished on the basis that those in Article 5 are expected to be 'self-executing'. This means that all designated platforms must comply with the obligations in Article 5 within 6 months of their being designated, after which the Commission may take appropriate enforcement action. Enforcement action may include interim measures (Article 22), the acceptance of commitments to bring the gatekeeper platform into compliance (Article 23), and/or the issuing of a non-compliance decision and directions on the actions required to comply (Article 25), the issuing of a fine (Article 26) or, ultimately, the imposition of structural remedies following a market investigation (Article 16).

Article 7(1) requires that the measures taken by the gatekeeper to ensure compliance must be 'effective in achieving the objective of the relevant obligation'. Some guidance as to the objectives of each obligation appears in recitals 36-57 but the gatekeeper is expected to decide for themselves what measures are needed to ensure it complies with Article 5.

The obligations in Article 6 are described as being 'susceptible of being further specified' by the Commission. This can happen in one of two ways:

- The Commission may itself consider that the measures a gatekeeper proposes to take or has already taken are not compliant with the obligation in question[76] and can adopt a decision in which the Commission specifies the measures which the gatekeeper must take. The Commission must issue its 'specification decision' within 6 months of initiating proceedings but must communicate its provisional views to the gatekeeper within 3 months. Any measures proposed by the Commission must ensure effective compliance but must also be 'proportionate in the specific circumstances'[77].

- Alternatively, the gatekeeper may request that the Commission initiate a proceeding to determine whether a measure or measures which the gatekeeper proposes to take, or has taken, are effective and so compliant with the obligation in question. We assume the Commission would also be subject to the same 6-month deadline (with 3 months for provisional findings) as applies when proceedings are initiated by the Commission. The gatekeeper may provide the Commission with a submission that explains why the measures it proposes to adopt, or has already adopted, are compliant. The Commission is not obliged to act upon the request of the gatekeeper.

Under the Commission's proposals, compliance with both Article 5 and Article 6 can be achieved through the acceptance by the Commission of commitments offered by the gatekeeper during an enforcement proceeding (with those commitments being offered under Article 23)[78]. If the Commission accepts commitments it may declare there are no further grounds for action. The issue then becomes one of compliance with the commitments.

Although Article 23 is not entirely clear, it would appear the Commission need not accept the commitments offered. This would be the case if the Commission considered the commitments to be ineffective in terms of compliance with the obligation. But we think it might also occur in circumstances where the commitments would ensure compliance but the Commission nonetheless wished to proceed with enforcement action. This might occur, for example, if the Commission felt that the measures required to comply with obligations were so self-evident that the gatekeeper ought to have implemented them from the outset, rather than proposing them as commitments. That might be more likely to be the case in respect of Article 5 obligations, which the Commission regards as 'self-executing', than Article 6 obligations (although this is a presumption on our part that is not made explicit in the text). It might also arise if the measures the gatekeeper had taken fell so far short of being effective that the Commission considered that no serious attempt at compliance had been made[79].

Under the current proposals, both the gatekeeper and the Commission will face several different scenarios or what we might think as 'paths to compliance'. These are illustrated in the Annex to this paper[80]. Some scenarios appear less likely (as indicated by the dotted lines) than others but are not entirely excluded and remain at the discretion of the Commission. These are:

1. In cases of non-compliance with an Article 5 obligation (which is regarded as not requiring further specification) or an Article 6 obligation for which a specification decision has already been provided the Commission may be less likely to accept commitments and more likely to impose fines, even if the commitments offered would be an effective measure.

[76] This could be because they do not achieve the objectives, either because the gatekeeper and the Commission differ as to what the objective is, or because they agree on the objective but differ on whether the measures adopted will be effective in achieving it.
[77] There are additional requirements in Article 7(6) in relation to measures which relate to obligations under Article 6(1)(j) and (k) only.
[78] In this paper we use the term 'enforcement proceeding' to refer to procedures initiated under Articles 16 (market investigation into systematic non-compliance) and 25 (non-compliance)
[79] If these arrangements were to remain as currently proposed (i.e. without the presumptions which we propose) then we think it would be useful for the Commission to provide guidance as to when commitments might be accepted and when not
[80] We have ignored interim measures and measures following systematic non-compliance in order to simplify the presentation.

2. In cases of non-compliance with an Article 6 obligation for which a specification decision had not been provided by the Commission may be more likely to accept commitments (provided they are effective) and less likely to impose fines if an enforcement decision is made.

In addition to enforcing the existing obligations in Articles 5 and 6, the Act would allow the Commission to import new obligations, following a market investigation, which would then apply to all designated gatekeepers. Although not clear from the text, we assume that the gatekeepers would be a given a period, perhaps the same 6 months, in which to implement measures to comply with the new obligations. The removal or modification of existing obligations does not seem to be contemplated under Article 10. In the rest of this paper, we consider some aspects of the Commission's proposals which we think might be improved and discuss various proposals to achieve this.

3 The process of designating gatekeepers[81] (Articles 3 and 4)

The proposals for designating gatekeepers, including reliance on quantitative thresholds that can be rebutted with 'sufficiently substantiated' evidence, seem well designed to allow the Commission to apply regulatory obligations on time and give incentives to the platforms to disclose relevant information whilst at the same time allowing a degree of flexibility and consideration to be given to the specific features of particular firms or services. There are two aspects which might nonetheless be improved.

The first relates to the application of the criteria in Article 3(1) and the elements of Article 3(6), both of which will involve applying economic concepts (including new concepts such as 'gatekeeper' and the various core platform services which are defined in Article 2[82]) in a new and untested legal framework. **We think the Commission should be required to produce guidelines – either from the outset or after having acquired the experience of applying the criteria over several years –to assist firms and courts in understanding how the designation process should be applied.** This would assist those firms (whether they meet the quantitative thresholds or not) that may wish to present arguments challenging the intention of the Commission to designate them under Articles 3(4) or 3(6).

Secondly, the requirement under Article 4 to review every designation every 2 years appears too burdensome. **A longer period should be adopted – we suggest every 5 years.** This would remain alongside the Commission's capacity to initiate a review at any time if it has reason to believe that the facts on which the previous decision was made appear incorrect or to have changed over time. As currently proposed, such a review may be requested by the gatekeeper or initiated by the Commission without a request. A question arises as to whether a decision by the Commission not to act upon a request from a gatekeeper to review its designation would be a decision that was capable of being appealed. If the Commission were required to review within 5 years in any event, it is not obvious that a right of appeal is required. We would want to avoid a situation in which the Commission is continually in receipt of requests from gatekeepers which may provide a basis for appeals if the Commission declines to act on them. We propose later that certain decisions by the Commission not to act upon requests from gatekeepers ought not to be capable of being appealed. The legal position concerning designation decisions may, however, require further consideration.

[81] This paper is concerned with architectural issues, rather than the substantive criteria of designation. CERRE has previously argued that an additional criterion for Article 3(1), so that only gatekeepers providing more than one core service (i.e. controlling an ecosystem) would be regulated, see CERRE, https://cerre.eu/wp-content/uploads/2021/01/CERRE_Digital-Markets-Act_a-first-assessment_January2021.pdf, p.15

[82] Particularly the scope of 'online intermediation services', which would appear likely to encompass a very wide range of platform businesses.

4 The process of obtaining specification decisions on measures required to comply and the consequences of doing so (Articles 7 and 23)

The Commission draws a hard boundary between obligations in Article 5, which it considers to be generically applicable and sufficiently clear to mean that the measures required for each gatekeeper to comply with them ought to be self-evident, and obligations in Article 6 which it accepts may require a further specification (but for which it is not obliged to provide a specification decision in every case).

Our view is that this distinction is too sharp. We agree that there should be a presumption against an Article 5 obligation requiring a specification decision before a gatekeeper can be expected to comply and we also agree that there ought to be a presumption that the Commission will provide further specification concerning the Article 6 obligations. However, we would not want to exclude circumstances under which further specification is required for an Article 5 obligation, nor to exclude circumstances where the Commission thinks it already provided sufficient direction for an Article 6 obligation such that no further specification is needed.

We[83] suggest that:

3. **The Commission should be able to further specify measures to comply with any obligation in the Act (including those currently listed under Article 5)**

4. **Gatekeepers should be able to request a specification decision from the Commission concerning any obligation in the Act, but a decision as to whether to provide such direction remains wholly at the discretion of the Commission**

5. **The distinction between obligations in Articles 5 and 6 would be reflected in explicit presumptions (from which the Commission could depart in exceptional circumstances) that:**

    - **The Commission would not normally expect to provide a specification decision in relation to Article 5 obligations.**

    - **The Commission would normally expect to provide a specification decision in relation to Article 6 obligations.**

We also think further consideration needs to be given to the implications of allowing gatekeepers to request and the Commission to provide or not provide specification decision in relation to obligations.

The first question is whether a decision by the Commission not to provide a specification decision when requested by a gatekeeper under Article 7(7) should be capable of being appealed. Although the legal options require further analysis, we think it might be argued that a decision by the Commission not to open proceedings would be an act which had no direct effect on the gatekeeper (or other affected parties) since it would not affect the obligation on the gatekeeper to implement effective measures to comply and nor would it affect the range of measures which are available to the gatekeeper to do so. This is analogous to the position taken in the European Electronic Communications Code and its predecessors, where the Commission may take a decision under Article 7 to approve or reject a proposal it receives from a national regulatory authority. In that case, the European courts have found that the Commission's decision is not appealable and the proposals to regulate have to be subsequently adopted by the national regulatory authority in order for them to

[83] There are some differences in view amongst the CERRE academic team about the best approach but general agreement that the obligations in Article 5 and 6 represent a 'spectrum' rather than dividing easily into two discrete categories, as the Commission proposes.

have effect.[84] The, later, decision by the national regulatory authority can be appealed. By analogy, **we think a decision by the Commission not to act on a request from a gatekeeper to provide a specification decision would (and should) not be appealable, but that subsequent decisions to enforce against a gatekeeper (and require them to adopt measures to comply) or to impose a fine, would both be capable of being appealed**.

The next question is how the provision of specification decisions under Article 7 might relate to the commitments process under Article 23. The current proposals contemplate a gatekeeper being able to offer commitments irrespective of whether or not the Commission has already provided a specification decision on the measures to be taken for compliance.

This is another aspect of the architecture where we think presumptions would serve a useful purpose. We suggest that **if the Commission has provided direction on the specific measures to be taken (whether at the request of the gatekeeper or on its own initiative) then the presumption should be that the gatekeeper knows what it must do to comply and the Commission would be entitled to rely on enforcement action and fines rather than accepting commitments**. In such circumstances, the additional benefit of having the gatekeeper being able to propose commitments seems difficult to justify.

On the other hand, **if the Commission has declined to provide a specification decision then the presumption should be that the Commission will accept commitments that are effective and would not pursue enforcement action or fines**. We think there is also a good case for saying that **in the first instance of non-compliance where no specification decision has been provided, the Commission ought not to impose a fine**. But if, having issued an enforcement decision which directs a gatekeeper to take specified measures the Commission should be able to impose a fine for continued non-compliance with that decision.

So far, we have ignored the question of <u>when</u> a gatekeeper might request a specification decision or when the Commission might provide it. Article 7(2) makes it clear that the Commission can provide guidance either in anticipation of non-compliance (i.e. before a designated gatekeeper is required to implement measures to comply 6 months after having been designated) or after measures have already been implemented. Similarly, Article 7(7) refers to the gatekeeper requesting guidance either before it has implemented any measures to comply, or after it has done so but presumably thinks there is some uncertainty as to whether those measures will be considered effective.

There are two aspects of these arrangements that require discussion. The first is that **requiring the gatekeeper to be compliant 6 months after designation whilst also allowing the Commission 6 months to produce a decision on the measures required to comply does not seem very satisfactory**. It is true that the Commission is required to share its provisional views with the gatekeeper after 3 months, allowing the gatekeeper to have a reasonable idea of the measures the Commission is likely to require them to adopt. But the final decision, against which compliance will be assessed, may only arrive days or hours before the gatekeeper is expected to comply with its obligations. Some of these measures are likely to require a further period of time before they can reasonably be implemented.

This suggests two adjustments. First, the deadline for implementing measures, when the Commission has decided to provide a specification decision and the gatekeeper has only recently been designated, ought to fall after the date on which the Commission's final specification decision must be issued. This would **allow the designated platform enough time to implement any measures contained in the final decision before it is required to come into compliance**.

[84] *Vodafone v Commission* (T–109/06) EU:T:2007:384, para.150 and *BASE v Commission* (T–295/06) EU:T:2008:48, para.109.

The deadline for compliance with measures when the Commission has rejected a request from a gatekeeper to provide a specification decision (and has not initiated its proceeding) should remain at 6 months. **This would require the Commission to make its decision about whether to accept or reject a request for a specification decision quickly so that the gatekeeper has sufficient notice of whether it can expect to benefit from a further specification of measures to take or not.** A request for a decision must not in itself extend the deadline for compliance. Whether the deadline is extended beyond 6 months, and by how much, should remain a decision for the Commission, not the gatekeeper, to take[85].

Second, we think the **Commission should state the deadline for implementation of any measures it specifies in the specification decision itself**. This is to reflect the wide variation in measures that are likely to be required to be taken to ensure compliance and the variation in the time required to implement them. Article 25(3) already allows the Commission to specify the deadline for implementation of measures which are specified in an enforcement decision. The same should apply to measures which are specified pursuant a specification decision.

Third, we think a useful distinction can be drawn between most of the obligations in the Act and the **'data sharing' obligations** under Articles 6 (i) and (j) (and possibly 6(h)[86]. We think these are likely to **require both a much higher degree of specification and much longer than 6 months to implement**[87]. For example, they may require the specification of technical standards to be adopted, which may need to be developed in consultation not only with the designated gatekeeper but the intended recipients of the data. It could involve the establishment of a new independent oversight body – itself a form of regulation - as occurred for the data-sharing obligations imposed on banks in the UK (for which the Open Banking Implementation Entity was created)[88] and has been suggested by some observers.[89] It may require the Commission to decide on the level of charges which the gatekeeper is entitled to levy for the data it is required to share and it may involve requiring third parties to adhere to certain obligations before they can receive data, such as commitments to hold the data securely and to manage it appropriately.[90] Engagement and collaboration with other firms will take time but will be necessary if the measures are to be effective in achieving the objectives of the Act.

Thus, **the Commission might require more than 6 months specifying the measures required implementing these obligations and the gatekeeper (and others) might require a further significant time in which to implement them**. Allowing the Commission to specify the deadlines for implementation would recognise these challenges, but the process of specifying the measures might be more akin to a market investigation than the procedure that will be used to produce specification decisions for the other obligations.

Finally, the proposals include the possibility of the Commission providing a specification decision after a gatekeeper has already implemented measures to comply, but outside the context of an enforcement proceeding. This situation might arise if a gatekeeper were to request specifications of the measures required to comply before making changes to certain aspects of its business. Or the Commission, having previously declined to provide further specification, may decide that it is now appropriate to do so.

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[85] This mechanism would also be required when a new obligation is adopted, since the existing designated gatekeepers cannot reasonably be expected to comply immediately and the 6 month deadline from designation would not apply in this context.

[86] The UK Competition and Markets Authority makes this distinction and refers to these obligations as 'pro-competitive interventions' in order to distinguish them from codes of conduct which can be more easily specified. Some of the obligations in the Act may fall between the two.

[87] See https://cerre.eu/wp-content/uploads/2020/09/CERRE_Data-sharing-for-digital-markets-contestability-towards-a-governance-framework_September2020.pdf

[88] https://www.openbanking.org.uk/

[89] See Prüfer, J. and Graef, I. (2021). Governance of Data Sharing: A Law & Economics proposal. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3774912

[90] See Section 5.2.4.1 in https://cerre.eu/wp-content/uploads/2020/08/cerre-the_role_of_data_for_digital_markets_contestability_case_studies_and_data_access_remedies-september2020.pdf

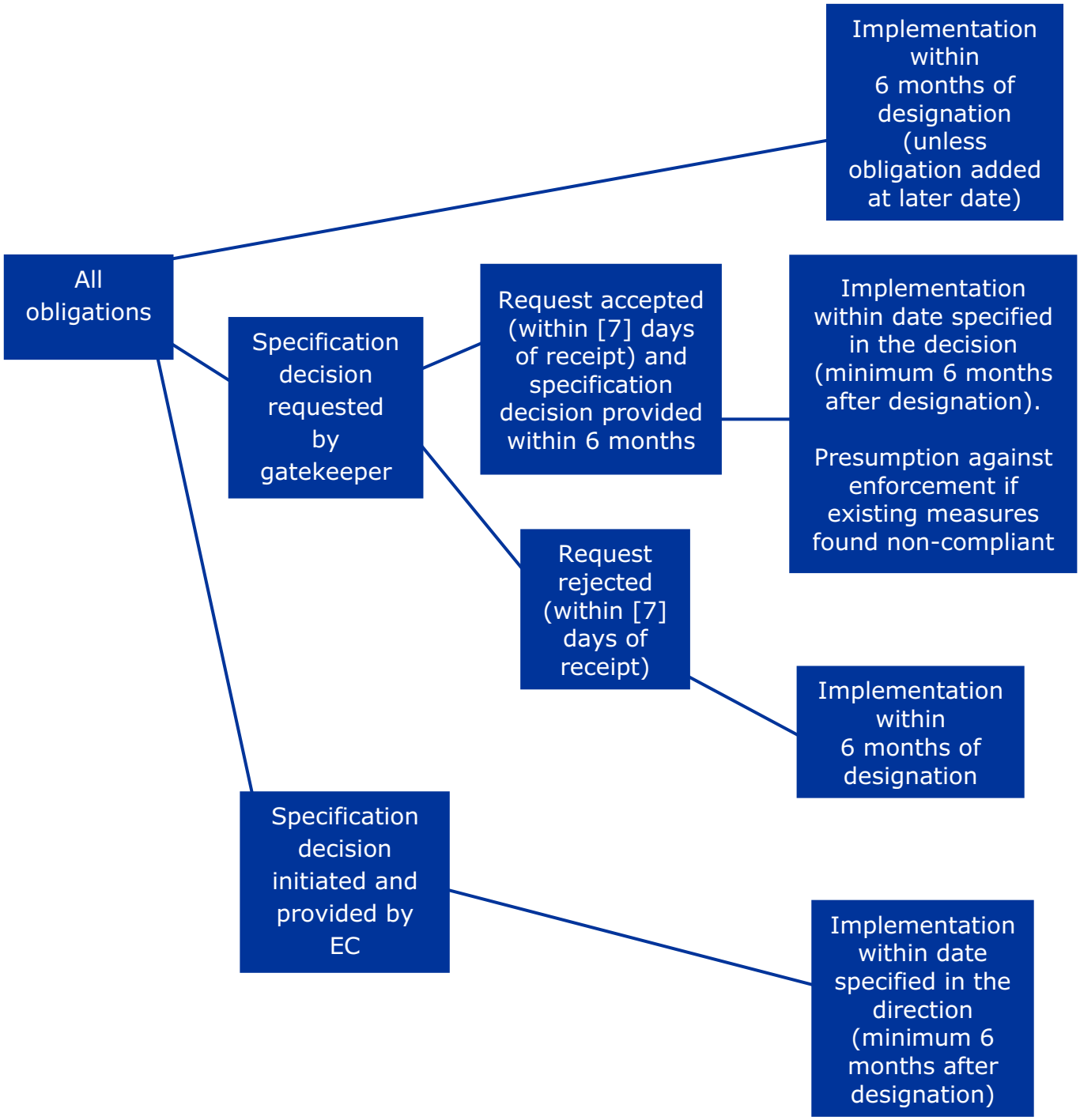
It could be argued that 'ex post' guidance of this kind is neither necessary nor appropriate and that the Commission ought only to specify measures before the gatekeeper is required to comply with the obligation in question. That would simplify the process but also reduce flexibility. It would remove the ability of the Commission to adjust its guidance in light of market or other developments or after having had the experience of how it was being implemented.

We think that **gatekeepers ought to be given incentives to pro-actively seek specific direction from the Commission despite having already implemented measures and despite already being under an obligation to comply**. This would contribute to the more constructive and less adversarial 'regulatory dialogue between the gatekeeper and the Commission which we are seeking to encourage. We are not convinced the Commission's current proposals provide adequate incentives for gatekeepers to actively seek guidance from the Commission in this way.

One way to achieve this would be to **introduce a presumption that a request for further specification would not normally lead to the Commission taking enforcement action if it concluded that the measures previously adopted by the gatekeeper had not been effective**. A gatekeeper that was uncertain about whether the measures it had taken ensured compliance could request further specification from the Commission. As outlined earlier, the Commission could agree to act or could reject the request, with the same presumptions applying. If the Commission declined to provide a specification decision, the gatekeeper would remain subject to the same regime as before it had made the request (i.e. it would be expected to comply without further specification but the Commission would be expected to accept commitments if they were effective). On the other hand, if the Commission accepted the request and issued a specification decision which suggested that the existing measures have been insufficient to ensure compliance, the gatekeeper would be required to comply with the decision (and could be subject to enforcement action if it did not) but could expect to avoid enforcement action concerning its previous non-compliance[91].

[91] We recognise that an issue remains as to whether the gatekeeper could be subject to a private claim for damages under competition law.

The various options presented in this part of the paper can be represented as follows:



5 Third party interests in the process

The current proposals envisage that the measures to be taken to comply with Article 6 may vary as between gatekeepers and may need to be further specified to take these differences into account. This seems to envisage a bi-lateral dialogue between the Commission and the gatekeeper in question (with Article 30 granting the gatekeeper certain rights of defence).

We think the Commission should also be required to consult with interested third parties (which might include other gatekeepers). This will add some complexity and delay into the process, but market testing proposed measures should also help ensure that they are effective. The **Commission should be required to consult with interested parties, both before making a specification decision under Article 7 and before accepting commitments under Article 23**. Enforcement proceedings may be initiated in response to complaints from third parties and it is appropriate that their interests be properly represented and that their views are taken into account. The Commission will no doubt be alive to the risk that designated gatekeepers might intervene in each other's proceedings to divert resources and attention from their own.

We would also expect **any decision of the Commission to be published**, subject to the normal confidentiality provisions. Although a decision under Article 7, 23 or 24 will specify the measures required to be taken by a particular gatekeeper in a particular set of circumstances, we envisage that the Commission's reasoning in many decisions would be relevant to other gatekeepers and may even avoid the need for them to request specification decisions of their own. Consideration should be given to ensuring that the decisions made by the Commission are as informative as possible, not only for the gatekeeper to whom it is addressed but for other gatekeepers and other parties who may be affected by the measures being adopted. This might include:

6. **Requiring non-confidential versions of Article 7 decisions to be published** in full within [7] days (including decisions not to open proceedings, where the reasons for not doing so should be provided in full)

7. Requiring the Commission to produce a **set of guidelines, based on the decisions it has made**, 3 years after the coming into force of the Act. This would guide gatekeepers and others as to the measures which would need to be taken to ensure compliance with each of the obligations in Articles 5 and 6. It would require the Commission to explain in detail how the measures achieve the objectives associated with each obligation, and what those objectives are.

6 Whether gatekeepers should comply with all obligations

The Commission's proposals contain a list of eighteen main obligations.[92] Some of these will not apply to some designated gatekeepers because the core services they provide are not of a kind that is addressed by the obligation in question. Obligations such 6(k) are directed at gatekeepers that provide app stores, 6(j) is relevant only to gatekeepers providing online search engines, 5(g) and 6(g) relate only to those gatekeepers that supply services to advertisers and others relate only to those that provide operating systems as a core service, like 6(b), 6(c) and 6(e). Gatekeepers that do not provide these services cannot take any measures that would ensure compliance (and so, in these circumstances, taking no action would seem to be a 'proportionate measure to achieve compliance').

[92] In addition, two transparency obligations apply on acquisitions intentions and on consumer profiling techniques at Articles 12 and 13.

The more difficult question is whether there are or should be circumstances under which a gatekeeper which might be in a position to take measures to comply with an obligation should be exempted from doing so. The Commission's proposals do not currently provide for this.

Under the Commission's proposals, compliance can only be secured through the implementation of measures which are 'effective' in achieving the objectives of the obligation in question. If a measure or set of measures are not effective (irrespective of whether they are specified by the Commission or proposed by the gatekeeper then the gatekeeper implementing them could be subject to enforcement action. If the measures are proposed by the Commission under Article 7(2) then Article 7(5) requires that they should also be 'proportionate in the specific circumstances of the gatekeeper and the relevant service.' This appears to recognise that differences between gatekeepers should lead to different measures being adopted to comply with the same obligation. Once the Commission is making enforcement decisions under Article 25, there is no specific requirement for the measures that it directs the gatekeeper to adopt to be proportionate. This appears to be an inconsistency in the current proposals which should be corrected.

Although measures which the Commission specifies may need to be proportionate and some obligations – notably Articles 6(b) and 6(c) - have exemptions specified within them, for most obligations the gatekeeper may only be exempted from an obligation to comply under very exceptional circumstances. These are specified in Article 8, where compliance would endanger the economic viability of the gatekeeper in question[93], or Article 9, where public health, morality, or security may be in jeopardy[94].

The Commission has argued against any 'objective justification' of conduct which would otherwise be prohibited under the Act, as is provided for in Articles 101/2 or in merger assessments where the parties can advance 'efficiency' claims[95]. In competition cases, conduct which might otherwise be prohibited may be tolerated where the provision of a service is not otherwise possible without the conduct in question (for example because the service has to be bundled with another service) or where contractual restrictions are required and yield benefits which outweigh any anti-competitive harms that might be associated with the restrictions. Similarly, in mergers, cost efficiencies which cannot be realised other than by the merger may, if passed through as benefits to consumers, be sufficient to outweigh any adverse effects arising from a lessening of competition.

It might be argued that it would be inappropriate to include such provisions in the Act as the obligations that are contained in Articles 5 and 6 are generally derived from cases where the Commission has already rejected arguments about objective justifications[96].

On the other hand, it could also be argued that what may be harmful conduct in many circumstances may nevertheless be justified in some and that, given the range and variety of gatekeepers and business models that the Commission proposes to regulate, a prediction that exemption from any obligations in the Act could never be justified for any gatekeeper is too sweeping[97].

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[93] It might be argued that Article 8 would exempt a gatekeeper from having to comply if, by doing so, it was unable to provide the core service in question (i.e. the conduct that the obligation sought to prohibit was indispensable to the provision of the service). However, the focus on Article 8 appears to be the 'operations' of the gatekeeper as a whole and contemplates exempting compliance with the obligation for a number of core services at the same time (see 8(3)). On this basis, Article 8 would only be engaged if the economic viability of the gatekeeper as a whole was in question.

[94] In addition, only a sub-set of the obligations apply to 'prospective gatekeepers' that have been designated under Articles 3 and 15

[95] The Commission's Impact Assessment argues "they are often one-sided and do not seem to match the evidence underlying this Impact Assessment including the calls for regulation raised by an overwhelming majority of respondents to the open public consultations; they have also been rejected by the Courts as being unfounded.", para 158

[96] This is true for some obligations (e.g. in the Google Shopping and Android cases, Google advanced various objective justification arguments, all of which were rejected by the Commission, see https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, para 993-1008, 1155-1183, 1323-1332 and https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf, para 653-671)

[97] We note that the UK Competition and Market Authority proposes to exempt gatekeepers from obligations if: ''for example that the conduct is necessary, or objectively justified, based on the efficiency, innovation or other competition benefits it brings. This is in recognition of the fact that conduct which may in some circumstances be harmful, in others may be

An alternative approach - which would be consistent with other proposals in this paper and with CERRE's position in its first assessment[98] - would involve **allowing the gatekeeper to advance a relatively narrowly defined set of objective justification grounds in a request for an 'exemption decision' from the Commission**. This would work in the same way as requests for specification decisions, discussed above[99]. **One proposal is that these requests should be made mutually exclusive so that the gatekeeper could either argue that it should be exempted from taking any measures to comply with the obligation (if it thought it had strong arguments for this) or it could seek further specification from the Commission on what measures it should take to comply (i.e. having accepted that it should do so).[100]**

If it sought an exemption, the gatekeeper would need to show that any attempt to comply with the obligation would result in a failure to achieve the objectives of promoting contestability and fairness over the longer term[101].

As with requests for specification decisions, the Commission could, at its discretion, open a proceeding to address the request from the gatekeeper and issue an exemption decision, or it could reject it without this decision being subject to appeal[102]. If the Commission rejected the exemption application, the gatekeeper would be expected to comply with the obligation without the benefit of being able to obtain further specifications from the Commission at that point[103]. It would remain open to the gatekeeper to seek further specification at some later date (although the Commission may wish or need to guide as to when it would be willing to consider a further request from the gatekeeper to avoid a repetitive cycle of requests and rejections)[104].

If the Commission accepted an exemption request[105], there would **be a question of how long any exemption decision ought to apply for.** The Commission's proposal envisages that suspensions granted under Article 8 should be **reviewed every year**. A similar requirement could apply to any exemption on objectively justified grounds.

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permissible or desirable as it produces sufficient countervailing benefits. We would anticipate guidance clarifying the circumstances when countervailing benefits might be accepted as a justification.' See https://assets.publishing.service.gov.uk/media/5fce73098fa8f54d608789eb/Appendix_C_-_The_code_of_conduct_.pdf, para 35

[98] CERRE p. 22

[99] Other approaches are also conceivable, such as the addition a provision requiring a gatekeeper to take 'all reasonable steps to comply' with an obligation (which might allow a gatekeeper to argue during an enforcement proceeding that there were no reasonable steps it could take) or to rely on the Commission exercising forbearance rather than granting specific exemptions in cases where compliance did not appear to offer any or significant benefits.

[100] Views differ within the CERRE academic team on the merits of this proposal. Some consider that gatekeepers should be allowed to advance objective justification arguments alongside requests for further specification in order to avoid the risk that otherwise they will be advanced sequentially. However, if the Commission wished to provide further specification under Article 7(2), having rejected a request for exemption, it would be free to do so.

[101] This would be necessary to ensure that short-term efficiencies do not frustrate the objectives of the Act, which are to safeguard the competitive process in digital markets over the longer term.

[102] If the Commission did reject the request to consider an exemption, it would be open to the gatekeeper to revisit this aspect of its claim when appealing a subsequent non-compliance decision of the Commission, should that situation arise. Therefore, a gatekeeper could challenge an enforcement decision from the Commission on the grounds that the measures it had taken had been effective in achieving the objectives of the obligation but also on the grounds that, even if ineffective, the measures ought not to have been required by the Commission on objective justification grounds.

[103] Assuming the obligation was relevant to the activities being undertaken by the gatekeeper in question.

[104] This point applies to any application made by the gatekeeper and rejected by the Commission – there clearly has to be some period of time before a further application can be made without the process becoming too inflexible or curtailing the rights of gatekeepers.

[105] This is further complicated by the fact that a decision to open a procedure to consider an exemption request is not the same thing as a decision to grant an exemption. The Commission could very well decide to examine the request for an exemption but conclude, after 6 months, that it was not warranted. As with proceeding relating to specification decisions on measures, the Commission should be required to notify the gatekeeper within [7] days of receiving the request whether it intends to act upon it.

7 Changing the obligations (Article 10)

The Commission's proposal anticipates that the list of obligations in Articles 5 and 6 may need to be supplemented to ensure that new forms of conduct (which may also limit the contestability of core platforms or maybe unfair) can be effectively addressed. Article 10 provides the Commission with the powers to do this, following a market investigation. There are several aspects of these arrangements which might be improved.

First, it should be clear that, in addition to introducing new obligations, the Commission can also amend existing obligations. This might be required it were to be found that compliance was difficult to achieve without being disproportionate, that the obligation could otherwise be better formulated (e.g. to provide for some specific exemptions), or that competitive or other conditions had changed such that original assumptions behind the obligation no longer applied in the same way. The **Commission might be expressly required to review the impact of the obligations during the periodic review** that is required under Article 38 and to propose amendments in light of these findings. The timing of the first review is not specified, but the Commission then envisages a review every 3 years. **We think a 5 yearly review is likely to be more appropriate (and would be consistent with review cycles in other European legislation.)**

Second, we note the current proposals do not seem to anticipate the withdrawal of obligations. It may be that the Article 38 review just referred to would also allow the Commission to propose the removal of obligations in the (highly unlikely) event it thought this necessary. It is not clear to us that any additional procedure should be required.

There is then a question of the process by which new obligations may be added or existing obligations amended[106]. The current proposals require the Commission to undertake a market investigation under Article 17 before changes can be made to the obligations in Articles 5 and 6. This provides designated gatekeepers with some predictability and assurance that the obligations they have taken measures to comply with will not be changed, or new obligations introduced, at short notice or without proper consideration. On the other hand, a market investigation can take up to 24 months, which could mean that obligations which are not fit for purpose or are difficult to enforce could remain in place for a significant time[107]. Besides, Article 10 allows the Commission to use delegated acts under Article 37 (without having to consult the Digital Markets Advisory Committee[108]) to introduce new obligations to pursue the objectives of the Act (contestability and fairness) which remain very broadly defined. Potentially, a wide variety and a large number of obligations could be introduced by the Commission using these mechanisms. This could represent a significant expansion in regulation for gatekeepers without the Commission itself being subject to much external scrutiny.

One alternative approach would be to retain the Article 10 process for the addition of substantively new obligations but to **allow for a more flexible approach when it comes to modification of existing obligations**. The evidence required to justify changes of this kind ought to already be available to the Commission and to have been gained from its attempts to enforce compliance with the obligations in their current form. Revisions to existing obligations might require 6 or 12 months (since they would require consultation with all existing designated gatekeepers as well as other affected parties) rather than 24.

Another approach would be to **forego Article 10 altogether, limiting the Commission's capacity to expand the scope of the obligations to the periodic review cycle** under Article 38. The problem with this is that no specific preparatory analysis (of the kind undertaken in a market

[106] In addition to the issues considered here, we discussed earlier the need for gatekeepers to be given sufficient time to be able to implement measures to comply with new obligations before they can be subject to enforcement action.
[107] Similar concerns could arise in relation to the designation process if it takes 24 months to designate a new gatekeeper (and at least a further 6 months before it is required to comply with any obligations)
[108] It is odd that the Commission must consult the DMAC before adopting a decision to enforce an obligation but not before adopting a new obligation (although Article 37(4) requires consultation with 'experts designated by each Member State')

investigation) would be required before a new obligation was adopted. This might be appropriate if the Commission had identified additional obligations in the course and as a result of other activities, such as extensive competition law investigations (which is the analytical basis on which the Commission largely relies for the obligations in the current proposals). But we should seek to avoid a situation in which new obligations are introduced into the Act without the Commission having undertaken sufficient preparatory work to ensure their applicability. (We propose to discuss the interaction between competition law and the Act in a later seminar)

The existing list of obligations could also be supplemented (or some even replaced[109]) by a more flexible approach, which may constrain the scope for expansion of regulation. The regulatory design of the Unfair Commercial Practices Directive, with its 'three degrees of discretion' might be a source of inspiration here. Next to the detailed obligations of Articles 5 and 6, **a new Article could be included with a more generic definition of prohibited conducts**. This new Article could include a more generic prohibition of conduct having the object or the effect of limiting users switching or multi-homing, which would sit alongside the existing obligations in Articles 5(b), 5(c), 6 (e), 6(f) and 6(h). It could also include a more generic prohibition of conduct aimed at enveloping existing or potential competitors through bundling and self-preferencing, to sit alongside the detailed obligations in Articles 5(e), 5(f), 6 (a), 6(b), 6(c), 6(d), 6(i) and 6(j).

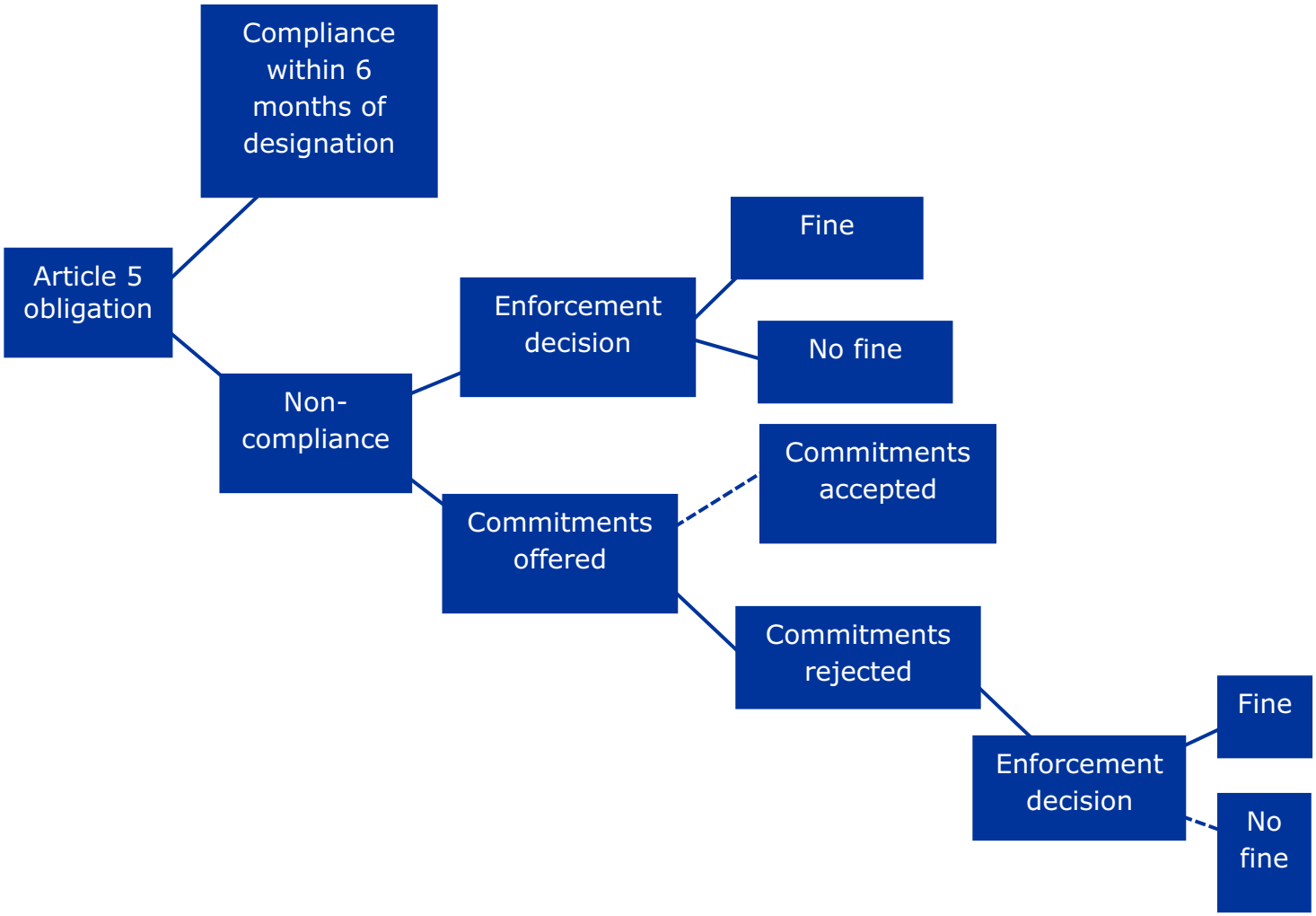
These obligations would be defined more generically, would apply to all gatekeepers, and would be enforced in the same way as the detailed obligations. However, further thought would need to be given as to whether and how the Commission might provide a further specification of the measures required for compliance (and whether, having done so, these would then become 'detailed obligations' like the others in Articles 5 and 6). These generic obligations would replace the Article 10 process.

[109] In our first assessment, CERRE suggested that the Article 5 list be further restricted to a sub-set of obligations, with everything else involving the further specification of the measures required to ensure the achievement of a set of four overarching objectives (see below), p.21. Views of the CERRE academic team may differ on the merits of this approach.

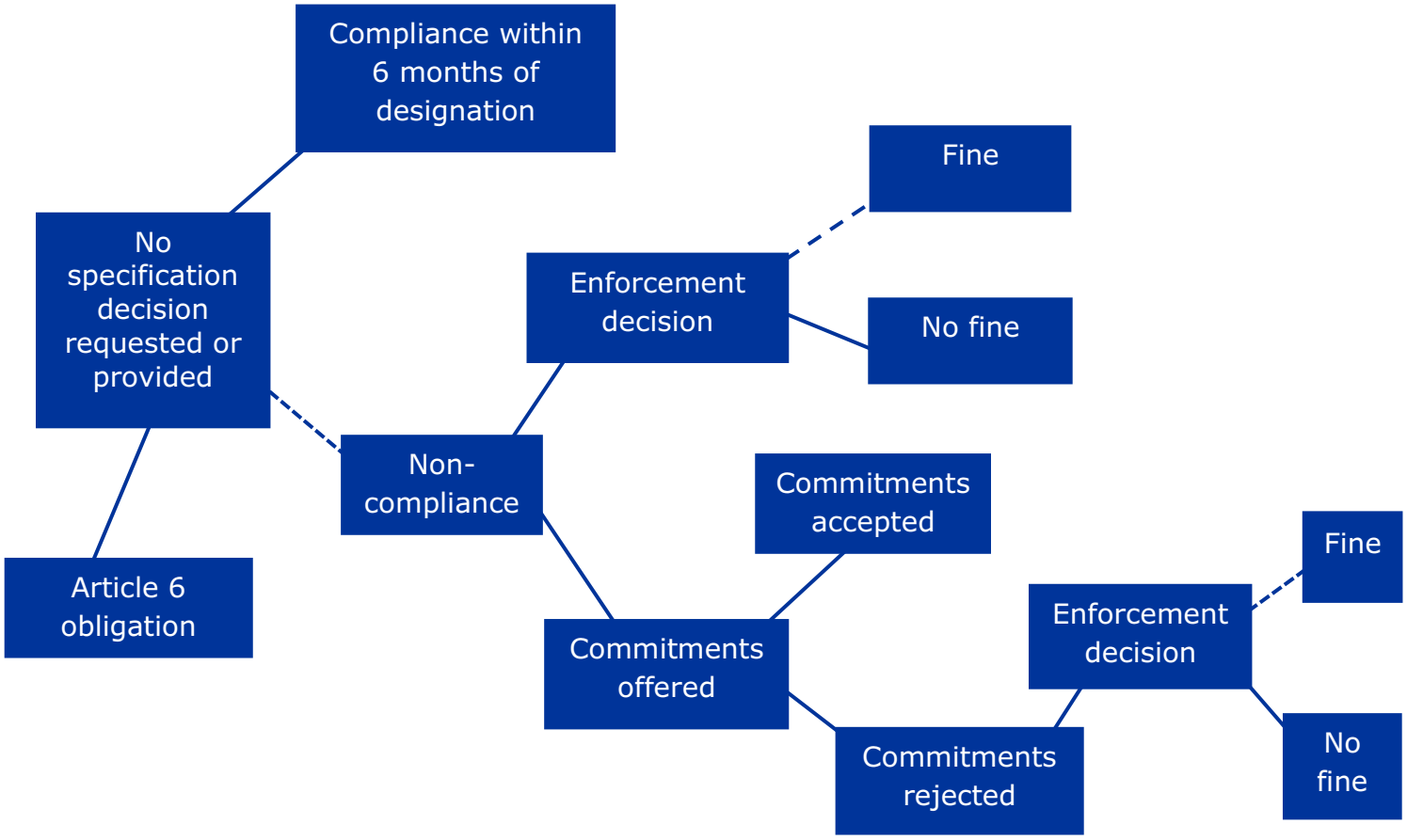
Annex

The implementation and enforcement process in the Commission proposal

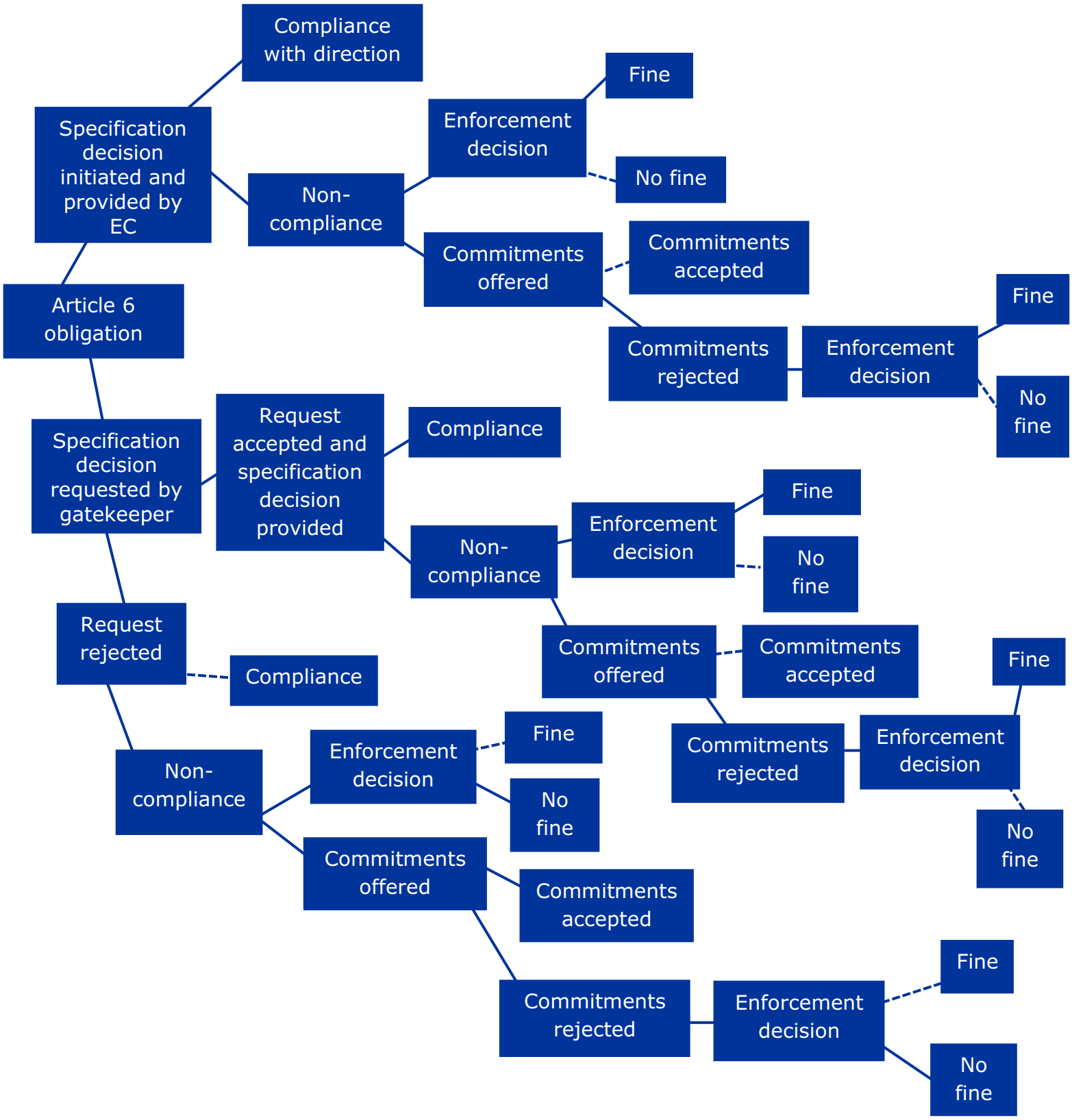
Article 5 obligations



Article 6 obligations – in absence of specification decision request or provision



Article 6 obligations – if specification decision requested and/or provided



THIRD ISSUE PAPER
OBLIGATIONS AND PROHIBITIONS

Table of contents

1 Introduction

This paper considers in more detail the eighteen proposed obligations and prohibitions in the DMA proposal.

The paper is in five sections: after this introduction, section 2 deals with the objectives of the obligations, why this is important and what each obligation is expected to do for fairness and contestability; section 3 examines the expected scope of each obligation in terms of the Core Platform Services to which it is expected to apply; section 4 examines the expected effectiveness of these obligations, as they currently stand, including key barriers to effectiveness, and areas where there is likely to be a need for further specification; and section 5 examines the risk of unintended harm arising from the obligations.

2 The objectives of the obligations

2.1 The role of the DMA objectives

The general objective of the DMA is set out at Recital 79:

> *The objective of this Regulation is to ensure a **contestable** and **fair** digital sector in general and core platform services in particular, with a view to promoting innovation, high quality of digital products and services, fair and competitive prices, as well as a high quality and choice for end users in the digital sector. [emphasis added]*

Thus, the two principal DMA objectives are **contestability** and **fairness,** but these are in turn intended to create good incentives for innovation, high quality and choice, and fair and competitive prices. Between them, the two principal objectives are supposed to underpin all current and future obligations:

- **For existing obligations,** Article 7 states clearly that:

  *The measures implemented by the gatekeeper to ensure compliance with the obligations laid down in Articles 5 and 6 shall be **effective in achieving the objective of the relevant obligation***; while

- **For new obligations,** Article 10 states that:

  *The Commission is empowered to adopt delegated acts […] to update the obligations laid down in Articles 5 and 6 where […]it has identified the need for new obligations addressing practices that limit the **contestability** of core platform services or are **unfair** in the same way as the practices addressed by the obligations laid down in Articles 5 and 6.* [Emphasis added].

In addition, any implementation of the DMA would be subject to the requirements on proportionality under the EU Treaties, and this too is closely linked to the stated objectives. The DMA recitals (para 33) highlight that:

> *The obligations laid down in this Regulation are limited to what is necessary and justified to address the unfairness of the identified practices by gatekeepers and to ensure contestability in relation to core platform services provided by gatekeepers.*

Article 5 of the Treaty on the European Union (TEU) itself states that:

> *'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'.*

In practice, the case-law on proportionality under TEU suggests that assessment involves four elements: (1) an appropriate (or suitable) measure; (2) in pursuit of a legitimate objective; (3)

among the appropriate measures that measure which constitutes the least restrictive measure; and (4) not manifestly disproportionate in terms of costs versus benefits balance.

2.2 The DMA objectives of contestability and fairness

Given this framework, it seems vital that the meanings of the contestability and fairness concepts, as used in the context of the DMA, are clear. There are, however, relatively few details provided about what is meant by the terms 'fairness' and 'contestability'.

Article 10(2), which relates to the use of market investigation to update obligations, sets out that:

> *A practice […] shall be considered to be unfair or limit the contestability of core platform services where:*
>
> *a) there is an **imbalance of rights and obligations** on business users and the gatekeeper is obtaining an advantage from business users that is disproportionate to the service provided by the gatekeeper to business users; or*
>
> *b) the **contestability** of markets is weakened as a consequence of such a practice engaged in by gatekeepers.*

The Impact Assessment (at paras 109/110) is more forthcoming (emphasis added):

> *[C]ertain digital markets may not be functioning well and delivering competitive outcomes due to their particular features, in particular extreme scale (or scope) economies, and a high degree of vertical integration; direct or indirect network effects; multi-sidedness; data dependency; switching costs; asymmetric and limited information, and related biases in consumer behaviour as well as the conduct of gatekeepers. Therefore, **a specific policy objective is to allow identifying and addressing such market failures in respect of key digital markets to ensure that these markets remain contestable and competitive**. This will contribute to digital markets delivering low prices, better quality, as well as more choice and innovation to the benefit of EU consumers.*
>
> *Gatekeepers' economic strength, their position of intermediaries between businesses and consumers together with market dynamics fuelling gatekeepers' growth lead to an imbalance in power between gatekeepers and their business users. This enables gatekeepers to impose unfair commercial conditions on business users, thus hampering competition on the platform. Such unfair behaviour does also have a negative impact on (the emergence of) alternative platforms since it strengthens consumer lock-in thus preventing multi-homing. In light of this, **a specific policy objective is to lay out a clearly-defined set of rules addressing identified gatekeepers' unfair behaviour, thereby facilitating a more balanced commercial relationship between gatekeepers and their business users, which would be also expected to create the right incentives for multi-homing.***

These various reference points help to discern what is intended by the terms contestability and fairness in the context of the DMA. However, they leave some questions unanswered. At the same time, while the DMA obligations are discussed both in the DMA Recitals and the Impact Assessment, there is no comprehensive discussion of how each obligation is intended to deliver against each objective. Indeed, it is also not clear whether any obligations are meant to deliver against both objectives, as opposed to just one. In assessing the effectiveness of each obligation, this would seem important.

2.2.1 What is meant by fairness? And what obligations does this relate to?

Fairness is a term that can mean many things in different contexts. In the context of the DMA, it is clear that, for a commercial practice to be unfair, it must result from an imbalance of power between gatekeepers and business users and confers a disproportionate advantage on the gatekeeper. This is useful but it is not a very full explanation.

At the same time, when regulating bilateral trading relationships between commercial parties, any fairness concept must be fairly tightly defined. The reason for this is well set out by Tommaso Valletti (then DGComp Chief Economist) in a different, but analogous, context (the debate around unfair trading practices regulations in the food supply chain):

> *It is not obvious to determine what is "fair" or unfair" in bilateral commercial negotiations […] Commercial transactions between various businesses along the supply chain typically aim both at (i) maximizing the total gains from the transaction (i.e. the size of the pie), and (ii) splitting these total gains between parties (i.e. sharing the pie). Therefore,* ***identifying efficiency-enhancing commercial practices as unfair trading practices and prohibiting them could very well harm all parties involved*** *[…] by reducing the size of the pie (the total gains from the transaction) to be shared between the trading partners in the first place.*[110] *(emphasis added)*

This risk is serious. It is therefore important to ensure that the concept of fairness utilised within the DMA is focused on enhancing overall efficiency. This is in line with Recital 79 cited above. We propose that a good way to do this is to **focus on the fairness of commercial opportunity, rather than focusing on how any resulting surplus is shared out**. If market actors have greater fairness of commercial opportunity, then a fairer sharing of the surplus should emerge anyway, without this being a direct objective. We have identified four possible categories of fairness that link to the idea of commercial opportunity, and how such opportunity might be unfairly limited due to an imbalance of power. Between them, these four categories appear to underpin the vast majority of proposed DMA obligations:

i. **Fair right to access alternative routes to market:** Some of the commercial terms addressed by the proposed Obligations restrict business users' use of alternative platforms or other routes to markets. Examples include Articles 5(b), 5(c), 6(1)(c), 6(1)(d).

ii. **Equitable treatment of third-party business users relative to the gatekeeper's rival services:** Some of the proposed Obligations are designed to ensure non-discriminatory treatment of all business users, irrespective of who owns them**.** Examples include Articles 5(e), 5(f), 6(1.a), 6(1.b), 6(1.e), 6(1.f), 6(1.i), 6(1.k).

iii. **Fair transparency about the service provided and the terms of those services:** This is addressed in the context of the advertising services by Articles 5(g) and 6(1.g).

iv. **Fair rights of expression to public authorities:** The right to complain to public authorities is addressed by Article 5(d).

These four categories appear well-aligned with an efficiency-focused concept of fairness. We note that only the first is tightly linked with the specific aim of increasing multi-homing which is highlighted at para 110 in the Impact Assessment, cited above, but we find the focus on multi-homing unduly narrow. It is noteworthy that, if one includes all four of these aspects within the DMA concept of fairness, then this concept arguably motivates almost all of the DMA obligations (other

[110] Commission Staff Working Document of 12 April 2018, Impact Assessment on the Proposal for a Directive on unfair trading practices in business-to-business relationships in the food supply chain, SWD(2018) 92: Annex H: Economic Impact. See pp.260-268 at: https://ec.europa.eu/transparency/regdoc/rep/10102/2018/EN/SWD-2018-92-F1-EN-MAIN-PART-1.PDF.

than Articles 5(a), 6(1.h) and 6(1)). We also note that all eighteen Obligations are described – at Annex 5.2.2 in the Impact Assessment – as addressing 'unfair practices'.

It is perhaps not so surprising that **almost all of the Obligations can be justified on fairness grounds, given that there are direct links between unfair commercial practices, as described above, and contestability**. Taking each of the forms of fairness identified above in turn:

i. ***Fair right of access to alternative routes to market*:** Commercial practices that restrict business users from accessing rival routes to market inherently limit the entry and expansion of such alternatives to act as a competitive constraint to the gatekeepers' core platforms. More generally, any barrier to multi-homing can make a service which exhibits network effects more likely to 'tip' towards being concentrated. Alternative routes to market could include rival platforms, but could also include direct access to market, or partial platform disintermediation, for example through using alternative ancillary services or using the platform for only part of the service offered by the business user**.** Such unfair commercial practices directly constrain platform contestability.

ii. ***Equitable treatment of third-party business users relative to the gatekeeper's rival services*:** Discriminatory commercial terms that give the gatekeeper an unfair advantage in related markets inherently enable it to leverage from its core market position into these related markets. In the longer term, such commercial practices may indirectly constrain platform contestability, since the most likely source of entry into a gatekeeper's core platform service will often be a successful business user of the platform, either through reverse integration into the platform service or through fostering entry by an independent platform.

iii. **Fair transparency about the service provided and the terms of those services:** Business users can only make informed decisions about the use of alternative platforms if they have a good understanding of the deal they are receiving from the gatekeeper platform. As such, greater transparency should foster contestability.

iv. **Fair rights of expression to public authorities:** Unless firms have the right to complain to public authorities, the DMA (and also competition authorities) will unlikely be fully effective in driving up contestability.

Indeed, the discussion of the fairness objective in the Impact Assessment (as cited above) emphasises the concern that, due to their economic strength, gatekeepers can impose terms on business users that both distort competition **on** the platform but also, over the longer term, limit contestability **to** the platform.

We note that, **as currently described within the DMA proposal, the concept of fairness relates purely to the treatment of business users**. This might seem odd, given that some of the obligations appear to relate to the fair treatment of end-users, not just fairness to business users. In particular, *Articles 5(a), 5(e), 6(1.b) and 6(1.h)* would seem at least partially motivated by the fairness objective for end-users relating to data protection and data control.

However, it may be that the Commission fears that incorporating fairness to end-users would open up the fairness concept too far, and move too far in the direction of consumer protection. This may be right, and we note that the obligations we identify can also be motivated by other fairness and/or contestability considerations. If the DMA is successful in achieving its core objectives, this should create a fairer situation for end users too, without this needing to be explicitly incorporated within the DMA's fairness concept.[111]

[111] We note that Recital 12 does appear to refer to end-users, but – given the language used elsewhere in the DMA – perhaps this is intended in this indirect way. *"Weak contestability and unfair practices in the digital sector are more frequent and pronounced for certain digital services than for others. […] These providers of core*

2.2.2 *What is meant by contestability? And what obligations does this relate to?*

As regards the contestability objective itself, the paragraphs cited above are clear that this is intended to relate to the **contestability of regulated Core Platform Services (CPS) only. This is a relatively narrow approach, in that it arguably excludes two important forms of contestability**.

First, it is not clear whether the DMA concept of contestability encompasses **platform disintermediation.** This can take two forms: *either* business users moving to direct supply (as opposed to an alternative platform); *or* partial disintermediation, whereby business users utilise an alternative provider for some – but not all - parts of the CPS service(whether this will be contracting out ancillary services to a third party, or dealing directly with end users). Platform disintermediation may not lead to the entry or expansion of a full-service rival to the gatekeeper but can provide an important competitive constraint on it. We would suggest that platform disintermediation should be recognised as an element of contestability.

Second, it is not clear whether the DMA concept of contestability encompasses **contestability of related markets, and therefore addresses unfair leverage by a gatekeeper from the regulated CPS into related markets**. In this context, we note that the Furman Report (and others) identified two key problems with digital platform markets: first, that they have a tendency to tip to being highly concentrated and hard to contest; and second, that the incumbent platforms then tend to leverage their position into related markets. The current contestability objective encompasses the former concern, but not the latter.

An argument could be made that leverage into related markets does, over the longer term, indirectly limit core platform contestability, since a likely source of entry into a gatekeeper's core platform service will often be a successful business user of that platform service. In this case, a focus on the contestability of regulated CPS only still arguably be used to justify obligations that address leverage. However, it is far from clear from the wording in the DMA proposal that this is intended.

There is an exception, in which the narrow DMA contestability objective, as it stands, does appear to address leverage, but this is the very specific instance where a gatekeeper has multiple regulated CPS, some of which are effectively business users of others. For example, Google Search could be viewed as a 'business user' of the Android OS. In this situation, leverage from one regulated CPS service would directly impact the contestability of another regulated CPS, and this would fall within the narrow formulation of contestability.

However, significant concerns about leverage into related markets extend beyond situations where both CPS already constitute an important gateway for the gatekeeper, in the terms of Art 3(1.b). Moreover, **despite the narrow drawing of the contestability objective to contestability of regulated CPS markets, there are in practice several obligations which appear to reflect concerns about both the leverage into related markets, and barriers to platform disintermediation** as shown in Table 1.

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*platform services have emerged most frequently as gatekeepers for business users and **end users** with far-reaching impacts, gaining the ability to easily set commercial conditions and terms in a unilateral and detrimental manner for their business users and **end users**"*. (Emphasis added)

Art.	Summary of the obligation	Promote direct CPS contestability	Promote platform disinter-mediation	Limit leverage into related markets
5a	No data fusion without user consent	x		x
5b	No wide MFN/parity clauses	x		
5c	No anti-steering	x	x	
5d	No prevention of raising issues with public authorities	x	x	x
5e	No tying to business users from CPS to ID services	x	x	x (into ancillary services
5f	No tying from CPS to other CPS	x		x (but only into regulated CPS)
5g	Price transparency for ads	x	x	
6.1a	No use of data related to business users to compete against them	x*		x
6.1b	Allow un-installing of apps, unless essential to OS/device	x*		x (into apps)
6.1c	Allow 'side loading' of third-party apps or app stores, unless threatens the integrity	x (app stores)	x	x (into apps)
6.1d	No self-preferencing in rankings	x*	x*	x
6.1e	No technical restriction of switching or multi-homing across apps using OS	x*		x (into apps)
6.1f	Access and interoperability for business users and ancillary services to OS should be as for proprietary ancillary services	x*	x	x (into apps and ancillary services)
6.1g	Performance transparency for ads	x	x	
6.1h	Provide real-time data portability for end-users	x		
6.1i	Provide real-time data sharing for business-users	x		x
6.1j	Data sharing obligation: FRAND access to click and query data	x (Search)		
6.1k	Fair and non-discriminatory terms of access to app stores	x	x	x (apps)

* For these, the CPS contestability narrative only appears to holds in specific instances where the gatekeeper has a regulated CPS in both a platform market and a related business user market

Table 1: Apparent 'contestability' objectives of the obligations

This table sets out our view on the expected impact of each obligation in relation to each of these categories of contestability. We note that:

- While all of the obligations can be viewed as promoting **direct CPS contestability**, there are (at least) five cases where the primary focus appears to be on limiting leverage. An impact on direct CPS contestability only arises for gatekeepers that have at least two regulated CPS and one is a business user of another.
- Around seven of the obligations appear intended to promote **platform disintermediation**, either partial or full. This could in turn facilitate the development of new platforms.

- Around 12 out of the obligations would be expected to limit leverage by the gatekeeper from a regulated CPS into a related market (whether or not it is a regulated CPS in that related market). As discussed above, limiting such leverage would be expected to directly promote the **contestability of the related market**, but only indirectly (if at all) to promote contestability in the core CPS market.

Why do we see a focus on leverage into related markets, even though it is not part of the contestability objective? As was highlighted above, it seems that **leverage concerns are effectively addressed within the DMA via the fairness objective**. If this reading of the DMA proposal is correct, it implies a slightly odd situation, in that a potentially important strand of contestability issues – leverage which harms contestability in related markets - are being addressed under the fairness objective.

Of course, it could be argued that it is appropriate for the DMA to be cautious about limiting leverage by the gatekeepers into related markets, or even that this is not a suitable objective for the DMA. After all, there is a risk that obligations which are designed to limit leverage could have an ambiguous impact on contestability in these markets:

- On the one hand, if regulation were to unduly restrict the ability of gatekeepers to enter and expand in new markets, then this could harm contestability in these related markets, rather than enhancing it.
- On the other hand, if it is unduly easy for gatekeepers to enter and expand in related markets, then this will limit the ability and incentive for independent third parties to do so, reducing contestability in these related markets. In this case, regulation which limits such leverage would enhance contestability in these related markets.

Given this balance to be struck, the **DMA would ideally balance these concerns by not preventing gatekeepers from entering or expanding into related markets, but limiting them from doing so by unfairly leveraging from their position in their regulated core platform services**. But there is a fine line to be drawn here between fair and unfair market entry/expansion. **It could be that this is the line that the Commission is trying to draw when describing obligations which appear to relate to leverage as reflecting the fairness objective.** But if so, it would be useful to be more explicit about it.

Linked to this, another reason for the DMA adopting a relatively narrow concept of contestability may be that there is currently no potential for firms to make an objective justification defence for breaching an obligation. In this situation, it may make more sense to avoid obligations which could have positive or negative implications for contestability, and thus this could lie behind the currently narrow contestability concept. CERRE has previously recommended that objective justification should be possible, albeit on the relatively narrow grounds that compliance would in fact harm fairness and/or contestability, and thus act contrary to the objectives of the regulation.[112] **If such an objective justification were to be incorporated within the DMA, this would arguably strengthen the case for a more expansive concept of contestability**, which more fully reflects the competition concerns highlighted by the Furman Report and others.

A final point on contestability. It cannot be expected that the DMA (and certainly not any specific obligation) can be truly effective in ensuring contestability in CPS markets, as the Recitals suggest. Contestable markets – as envisaged by Baumol (1982) – are a theoretical construct. They require extremely strong assumptions, which more or less never hold in reality, and certainly do not hold in markets characterised by strong economies of scale and scope, network externalities, and consumer behavioural biases. **No one seriously expects the DMA to be able to 'ensure' contestable markets. Rather, it is hoped that the regulation will 'enhance' contestability**, in the sense of lowering barriers to entry and expansion and thereby better enabling and incentivising third

[112] CERRE DMA First Assessment Paper, January 2021, p.22-23.

parties to compete and innovate.[113] This concept of contestability is more of a spectrum: a market can exhibit less or more contestability, depending on the size of the barriers to entry and expansion. Does this mean that the wording needs to change?

2.3 Recommendations

It would be useful to spell out more fully within the DMA itself what is meant by the contestability and fairness objectives, how the two interact, and what are the limiting principles in relation to both concepts? However, we have also noted that the contestability objective appears unduly narrow. This leads us to the following recommendations.

- *Recommendation (a): The concept of fairness in the DMA should be clarified*

In terms of fairness, the discussion above suggests that the DMA fairness concept excludes both fairness to end users and the fair sharing of surplus between commercial firms. These may well be indirect benefits of the DMA, but they are not direct objectives. This could usefully be made more explicit. One way of clarifying the precise formulation of fairness would be to add in a **focus on commercial opportunity**. For example, Article 10(2.a) might be reworded:

> *"There is an imbalance of rights and obligations on business users, which restricts the commercial opportunity open to the business user, and so confers an advantage on the gatekeeper that is disproportionate to the service provided by the gatekeeper to business users"*

The Recitals might also usefully set out the four ways we highlight above in which an imbalance of power might feed into unfair commercial terms.

- *Recommendation (b) The concept of contestability in the DMA should be widened*

Serious considerations should be given to **widening the contestability objective to include both platform disintermediation and limiting unfair leverage by gatekeepers into related markets**. It seems inappropriate to introduce obligations which have these objectives under cover of the fairness objective. Such a widening may be less risky if the Commission also accepts the separate CERRE recommendation to introduce a narrow form of objective justification. In the alternative, if the contestability objective is not widened, the DMA should be more explicit about how leverage is addressed by the fairness objective.

Also, given the discussion of contestability above, we would recommend changing the wording around the objectives of the DMA **from 'ensuring' contestability to 'enhancing' contestability**.

- *Recommendation (c): Matching obligations with objectives*

It would also be useful for the DMA to **set out more clearly how each obligation is intended to deliver contestability and/or fairness**. This would better enable the assessment under Article 7 of the effectiveness of each obligation in achieving its objectives. It may also be useful in further clarifying the obligations themselves.

[113] See CERRE (2020), *The role of data for digital markets contestability: case studies and data access remedies,* **https://cerre.eu/publications/data-digital-markets-contestability-case-studies-and-data-access-remedies/**

3 The scope of the obligations

3.1 The Commission's proposal

Another issue concerning the obligations is that their likely scope, in terms of the Core Platform Services covered, is not always entirely clear. Table 2 below provides an initial assessment on which Obligations apply to which core platform service. The letters used for identifying CPS are based on the Article 2(2).

Our assessment shows:

- 8 of the 18 Obligations are (more or less) **focused on one or two particular CPSs**. Of these, obligation 5b, which restricts wide MFNS and exclusive dealing, is explicitly restricted to online intermediation services, but it is not entirely clear why. The exclusive dealing provisions, in particular, seem likely to be of value in other CPS too.

- A further 4 of the 18 appear to be **targeted to one or two particular CPSs**, but their applicability is ambiguous, and they could in theory apply more widely. Of these, Obligation 6(1)(d) on self-preferencing is theoretically of wide applicability, but in practice may only be relevant to a subset of CPS. But this is ambiguous.

- 4 of the 18 Obligations are effectively ecosystem-wide provisions, in that they relate to gatekeepers with **any type of CPS**. Of these, obligation 5(f), relating to tying between CPS, is also of wide applicability, in that it can apply to any CPS, but only applies between two 'relevant' CPS (i.e. CPS which are themselves 'important gateways').

- App stores are likely subject to the vast majority of Obligations (arguably 14 out of 18). Operating systems and marketplaces are each likely subject to around 9 out of 18. If one combines search engines (b) and their associated advertising services (h), then they are likely subject to 9 out of 18, and on the same basis social networks are subject to 8 out of 18.

- By contrast, some other individual CPS are likely subject to just 4 or 5 Obligations. In particular, this is relevant to number-independent communications services (e) and cloud computing services (g).

Ob.	Summary of the obligation	CPS relevant?	Comments
5a	No data fusion without user consent	All	Effectively ecosystem-wide.
5b	No wide MFN/parity clauses or exclusive dealing	a (app stores and marketplaces)	Clear (NB interesting that scope so narrow)
5c	No anti-steering	a (app stores and possibly marketplaces)	Fairly clear, although could apply more widely in theory
5d	No prevention of raising issues with public authorities	All	Effectively ecosystem-wide
5e	No tying to business users from CPS to ID services	All	Effectively ecosystem-wide
5f	No tying from regulated CPS to other regulated CPS	All, but needs at least two regulated CPS.	Clear (once related CPS have been clearly identified) but will be different for each gatekeeper
5g	Price transparency for ads	h	Clear
6.1a	No use of data related to business users to compete against them	a (app stores and marketplaces)	Ambiguous. Could apply more widely, e.g. to: b and h.
6.1b	Allow un-installing of apps, unless essential to OS/device	a (app stores) and f	Clear
6.1c	Allow 'side loading' of third-party apps or app stores, unless threatens integrity	a (app stores) and f	Clear
6.1d	No self-preferencing in rankings	a, b, c and possibly f	Ambiguous. Could apply more widely in theory.
6.1e	No technical restriction of switching or multi-homing across apps using OS	f (and arguably also a (app stores))	Ambiguous. Could apply more widely in theory.
6.1f	Access and interoperability for business users and ancillary services to OS should be as for proprietary ancillary services	f	Ambiguous. Could apply more widely in theory.
6.1g	Performance transparency for ads	h	Clear
6.1h	Provide real-time data portability for end-users	All	Effectively ecosystem-wide, but probably not h in practice.
6.1i	Provide real-time data sharing for business-users	a (app stores and marketplaces)	Ambiguous. Could apply more widely, e.g. to: b, c, d, g or h.
6.1j	Data sharing obligation: FRAND access to click and query data	b	Clear
6.1k	Fair and non-discriminatory terms of access to app stores	a (app stores)	Clear

Key: a – online intermediation services; b – online search engines; c – online social networking services; d – video-sharing platform services; e – number-independent interpersonal communication services; f – operating systems; g – cloud computing services; and h – advertising services.

Table 2: Likely scope of the obligations

3.2 Recommendations

- *Recommendation (d): Consideration should be given to regulating number-independent communications services and cloud computing services on the same basis as advertising services, that is only if 'provided by a provider of any of the [other] core platform services'.*

Very few obligations apply to number-independent communications services and cloud computing services, and no obligations apply uniquely to them. Where a gatekeeper provides these CPS alongside other CPS (such as Facebook and WhatsApp), it may make sense to include these within the overall regulatory scope. However, for firms which solely provide these services, it is far from obvious that it is proportionate to bring them into the regulatory fold on the basis of such limited regulatory coverage.

As explained in the issues paper on designation, the DMA could provide that **number-independent communications services and cloud computing services would be regulated as CPS only where gatekeepers were designated on the basis of another CPS** – and that they cannot be used for gatekeeper designation in their own right. This is effectively already the case for advertising services which are only categorised as a CPS in their own right if provided by a provider of any of the other core platform services listed.[114]

- *Recommendation (e): The presumption should be that obligations apply to all of the services provided by a gatekeeper within a regulated CPS*

A final recommendation relates to gatekeepers who are designated as having an important gateway CPS for one of the CPS categories, but also have other services within that CPS category. An example might be Apple, which could be designated as an intermediation service for its app store, but which also has e-book and e-music intermediation services. This raises an obvious question: does the regulation relate to all services within this CPS category or just the service which forms the basis of the designation?

Given the potential for services to change their precise nature rapidly in the digital realm, there is certainly an argument for CPS-wide designation. Moreover, it is in the nature of digital ecosystems that market power over a particular service also tends to confer a degree of competitive advantage over nearby services. At the same time, however, it may be disproportionate to impose all obligations on services which are included merely because they fall under the same CPS category.

On balance, the best option might be to **include all services within a designated CPS by default but for the Article 7 specification process to allow for the removal of non-core services from the scope of some or all obligations on grounds of proportionality**. We note, though, that this does not solve the problem for Article 5 obligations, where Article 7 does not apply. This would be solved if the distinction between Articles 5 and 6 were removed. Alternatively, it may be worth allowing for a narrow form of specification – on scope only – for Article 5 obligations.

- *Recommendation (f): Consideration should be given to explicitly narrowing the scope of specific obligations*

In some cases, it does not necessarily matter that the scope of an obligation is wider than the obvious CPS at which it is targeted. If there is no chance of the obligation applying to a particular CPS, then there is no work to be done in meeting the obligation. And if the obligation genuinely has general applicability across all CPS, then there may be a benefit in keeping the scope wide. This might potentially be true of Article 5(c) which prohibits anti-steering, for example, and appears to apply only to online intermediation services but might be a reasonable obligation to impose on any CPS to which it might apply.

[114] DMA Proposal, art.2(2h).

However, there are other obligations where the potential breadth of applicability, in terms of scope, seems potentially problematic. **Narrowing the scope is likely to be especially merited where the potential applicability of the obligation runs far wider than the core service which provided the original rationale** (see Table 2 in the Impact Assessment). Certainly, it is not obvious that the Commission has considered the proportionality of each obligation in relation to each CPS where it could potentially apply. Where this is true, it would seem appropriate and proportionate to explicitly narrow the scope of applicability.

In the alternative, given that this lack of clarity on scope primarily applies to Article 6 obligations, it should be made explicit that the scope of application can be narrowed through the specification process. Article 6(1h) on end-user data portability may be an example of an obligation where it would make sense to keep the scope of applicability broad in principle, but where it would be proportionate to narrow this through the specification process to specific CPS where data portability will make a real difference to contestability.

- *Recommendation (g): Consideration should be given to widening the scope of Obligation on MFN*

Obligation 5(b) on MFN is arguably more narrowly scoped than could be justified, especially for the element which bans exclusive dealing.

4 The expected effectiveness of the obligations

The eighteen proposed obligations within the DMA are currently not entirely clear, several could be achieved in a variety of different ways, and some involve managing explicit tensions, for example between contestability and privacy. As such, the issue arising for gatekeeper firms is not so much whether or not to comply with the obligations (clearly they must), but rather the manner of compliance.

Table 3 in the Annex sets out, for each of the 18 proposed obligations, some initial thoughts on:

(i) The likely effectiveness of each, and the factors that might limit this.

(ii) Practical issues likely to arise either upfront, via clarifying the obligation or through the specification process, or in the ongoing assessment of compliance.

(iii) Risk of any unintended harm arising from the Obligations, assuming that they are effective in achieving their primary aim (and excluding any risks that arise purely due to having lower revenues or higher costs, due to the regulation).

It would be useful to receive views at the workshop on the views and factors identified. However, based on this preliminary table, we have drawn the following conclusions.

4.1 Expected effectiveness and practical issues arising

Based on the assessment in Table 3, we identify significant concerns over the effectiveness of several of the eighteen obligations in their current form. There are **at least ten obligations where it would be useful if the DMA could provide additional clarity upfront, either within the Recitals or through reformulation of the objective**. Being as clear as possible upfront does create a risk of drawing the scope of the obligations too narrowly. However, it carries a huge benefit in terms of legal clarity (for both gatekeepers and business users) and in terms of the resources that will be required within the Commission to provide further specifications. In any case, the vast majority of Article 6 obligations are likely to require at least some further specification, at least as currently written.

The main questions and caveats identified fall under the following categories:

A risk that certain obligations may be unduly narrowly drawn and thus limited in its effectiveness. In particular, Article 5(f) prohibits tying **between regulated CPS markets**. This limits leverage between CPS activities where gatekeepers already have gateway power. While this is valuable, it is arguably rather narrow. Drawing from the discussion above about the merits of limiting leverage from core markets into related markets, there may be merit in extending this obligation to tying from regulated CPS markets into any related markets, not just other regulated CPS markets. This would be especially true if there were greater potential for (narrow) objective justification. Also, this obligation appears to be partially influenced by the Google Android case, but it is far from obvious that the obligation would have any effect on agreements between Google and OEMs, unless the latter are classed as 'business users'.

For the core **data-sharing provisions**, there is currently a **lack of specificity** about the requirements which could hamper effectiveness.

- For Article 6(1.h), relating to end user **data portability**, it is good that the provision specifies that data must be continuous and real-time.[115] However, as currently framed, there is **no explicit requirement on gatekeepers to utilise Open APIs or to provide data in a consistent format over time. Nor any requirement for the direct transfer of data to third parties, rather than via the end user. Nor any requirement for the gatekeeper to keep track of consumer consents, on a readily accessible basis, and enable consent to be re-confirmed or revoked**. The provision does set out that portability needs to be 'effective', so all this may be implicit, but it would usefully be made explicit. The reliance on the definition of data portability under GDPR also means that there is also no clarity as to whether the data to be ported would include observed data, and not just input data. For the provision to have significant contestability benefits, it needs to include both input and observed data.

- Likewise, for Article 6(1.i) relating to **business user data access**, the obligation requires the provision of aggregated ***or*** non-aggregated data, but it is not clear who decides which. Can the gatekeeper simply decide to provide aggregated data only, or is it constrained to doing so only where there is a GDPR issue and a lack of consumer consent?

- For Article 6(1.j) relating to **search data sharing**, there is likewise no requirement to adopt a consistent or open approach to data-sharing (unless this is implicit with the requirement of FRAND terms), and there is no explicit requirement that data be **real-time or even recent**. Nor is there an explicit requirement to give access to **all** queries, click and view data, as opposed to a subset of such data. Finally, it is not clear how much the usefulness of data will be limited by the required anonymisation process.

There are also risks that **certain obligations are too widely applicable**. For example,

- Article 6(1.f) requires gatekeepers to allow **business users and providers of ancillary services access to and interoperability** with its OS/hardware/software on the same basis as its own services. This obligation appears to be influenced by the payment services market, with business users wishing to utilise alternative payment service providers, and payment service providers seeking to access the mobile payments market. But it is in practice not constrained – indeed, it is not even constrained to ancillary services (whatever they are). This potentially introduces a **very extensive duty to provide access and interoperability across a whole range of different aspects of the gatekeepers' core platform services**. It is not obvious that this breadth of applicability is intentional, it may well not be proportionate, and it may anyway be difficult to make effective.

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[115] See CERRE, *Making data portability more effective for the digital economy,* June 2020: **https://cerre.eu/publications/report-making-data-portability-more-effective-digital-economy/**

- Articles 6(1.h) and 6(1.i) provide similarly extensive requirements around **data portability**. Experience from the UK Open Banking initiative suggests that it takes years, not months, to implement even a relatively simple data portability provision. Admittedly, the archaic banking infrastructure was part of the problem here, but the ambition here is far greater, and the scope very wide. If it is to be effective (see below), **data portability and sharing are complex and resource-consuming exercises**.[116] It is far from obvious that it is appropriate to require data portability in all circumstances, with no clear limiting principles. It is unlikely to be effective in enhancing contestability and could reduce the attention given to making data portability work well in those areas where it could make a difference. There may be a serious need for prioritisation of those instances of data-sharing that will have the greatest impact on contestability, rather than trying to do everything at once.

There are **incentive-based risks** around the effectiveness of provisions which seek to ensure **fair-treatment between the gatekeeper's proprietary services and those rival third-party** business users. For example:

- Article 6(1.d) prohibits **self-preferencing in rankings**, but 'self-preferencing' can be **hard to define in practice**. This is especially true in paid-for rankings, where the gatekeeper can always pay more for rankings, given that it keeps the proceeds.[117] It is also **hard to assess** whether the criteria utilised for ranking are genuinely objective. Moreover, even genuinely objective criteria can potentially be exclusionary – an example being Amazon giving preference in rankings to products which are 'fulfilled by Amazon' because it can be confident in speedy and reliable delivery; or Google giving higher rankings to sites which use Google Accelerated Mobile Pages because it can have confidence that they will load quickly. It is not clear that these examples will be addressed by this obligation.

- Article 6(1.k) requires that gatekeepers apply **fair and non-discriminatory terms of access to app stores**. Similar concerns arise here, especially if app stores charge for prominence (and there is nothing in the DMA that prohibits them from doing so). While Recital 57 provides some details on the benchmarks to be used as a yardstick for assessing the fairness of access conditions, it is **not clear that these benchmarks would fully prevent a gatekeeper from charging an unduly high price to both a third party business and its rival service**.

Consumer behavioural considerations: consumer inertia, consumer trust issues, over-willingness to sign up to unfair privacy consents, susceptibility to influence through choice architecture. Also, the fact that the gatekeeper is typically in control of the interface design will determine the **choice architecture** facing end users and can utilise A/B testing techniques to increase the impact of this choice architecture, potentially in ways that most suits its interests.[118]

A risk that GDPR requirements could limit effectiveness and that this could be exacerbated by gatekeepers acting with excessive caution in respect of GDPR, although this risk is partly addressed by the anti-circumvention provision in Article 11(2). There is also a question as to **what constitutes active consumer consent** in this context. Arguably consumers need to be given more than a 'take it or leave it' option whereby they are denied access to a service unless they give up all control over their data. But it is not clear whether this is required under the relevant obligations (or under the GDPR).

The Commission may face difficulty in assessing the evidence provided in relation **to technical exceptions**, e.g. in assessing the essentiality of apps in relation to obligation 6(1.b) or threat to integrity in relation to obligation 6(1.c).

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[116] CERRE, *Data sharing for digital markets contestability, Towards a governance framework,* September 2020.
[117] See CERRE (2019), fn. 118.
[118] CERRE, *Effective remedies for anti-competitive intermediation bias on vertically integrated platforms*, October 2019: https://cerre.eu/publications/implementing-effective-remedies-anti-competitive-intermediation-bias-vertically/

There are significant risks that **effective implementation is not likely to be feasible in six months**, and indeed that there could be a trade-off being speed and effectiveness. This is especially true for the interoperability and data-related obligations.

There also significant issues around **how to monitor some of the obligations**, especially around the use of data: breach (or circumvention) may not be apparent to either business users or end users.

Finally, we note that there has been no serious attempt by the Commission to **assess how effectively the group of obligations will work as a package**, and we have also not tried to do this. However, we note that there is no restriction on self-preferencing beyond ranking services/products, and that there are no provisions that ban the purchase, or requirement, of exclusive or preferential positioning. As such, it is not obvious that the obligations, as they stand, would have fully addressed the EC's Google Shopping or Google Android cases.

More generally, there is a question to be addressed about the extent to which – where relevant – the Obligations **apply to current contracts or just new ones**? If current, does this change termination rights – that is, does this mean that contracts can be entirely renegotiated? Would there be any exception for technical issues, for example if it were to prove technically impossible to enable already installed apps to be suddenly capable of being uninstalled?

4.2 Recommendations

The above issues give rise to a variety of recommendations. Note that we have not endeavoured here to propose precise revised wording, but rather to highlight the areas which merit further consideration.

- *Recommendation (h): Clarify or narrow down some obligations*

Given the concerns highlighted above in relation to obligations being too narrowly drawn, some **obligations require greater upfront clarification**, within the Recitals, or even reformulation.

It should be made clear, for instance in the DMA Recitals, that incentivising conduct, for example through offering higher rankings/prominence for firms that behave as desired by the gatekeeper, will be viewed as seriously as specific behavioural requirements.[119]

Moreover, as already recommended in section 3, the concerns highlighted above in relation to certainly obligations being too widely applicable, it should be **made explicitly possible for applicability to be refined and narrowed through the Article 7 specification** process.

- *Recommendation (i): In relation to choice architecture for consumer consent and other choices*

There needs to be **regulatory oversight of the choice architecture** put in place by the gatekeepers and overarching **principles for what is expected**. One option would be to require the gatekeepers to design their choice architecture so that it best reflects the decisions that consumers would make if making fully deliberative choices based on complete information. This should be testable via A/B testing. It would be useful to make explicit that the Commission can require gatekeepers to engage in such A/B testing and to provide the results of any such testing to the Commission.[120]

[119] CERRE, *Effective remedies for anti-competitive intermediation bias on vertically integrated platforms*, October 2019 made the recommendation that a ban of pay-for-prominence is not proportionate, but it may need to come with heightend transparency standards vis a vis the regulator.
[120] This recommendation is also made in CERRE, *Effective remedies for anti-competitive intermediation bias on vertically integrated platforms*, October 2019.

- *Recommendation (j): On data protection*

Given that there are likely to be significant issues of GDPR interpretation, the **Commission, as the DMA enforcer will liaise on these with the system of data protection regulation**.[121] The Commission should consider clarifying that active consumer consent requires that the gatekeeper provide a genuine choice, not a 'take or leave it' offer, and that consumers should be readily able to both give and revoke consent.[122]

- *Recommendation (k): On technical risks associated with the speed of implementation*

To limit the undue risk of technical error, there should be some potential for the regulator to, at its discretion, provide **additional time for implementation**.

The Commission needs to give thought to how it will deal with the more technically complex aspects of the regulation. It may need to arrange access to **technical 'Special Advisors**.'

- *Recommendation (l): Effective obligation and implementation*

More fundamentally, it is unlikely that the Obligations are going to be perfect. We consequently need a better system for good and EU interpretation of the obligations as well as a **better feedback loop whereby learning from experience is brought into implementation improvement**. For instance, a regular evaluation of the effectiveness and proportionality of the measures specified in Article 7 decision should be provided with the possibility for the Commission to re-specify the obligations if needed. More fundamentally, the list of Obligations in Articles 5 and 6 should be assessed at regular intervals with possibilities to add new obligations (as already foreseen in the Proposal) but also the possibility to remove obligations.

Finally, not discussed above, but while the obligation not to prohibit firms from raising issues with public authorities is welcome, it is unlikely to be fully effective until the Commission can offer a well-designed **whistleblowing function**, whereby complaints can be made in a way that protects the complainant's anonymity. Also, it would be useful to make explicit that the anti-circumvention element of the DMA (Article 11) implies that gatekeepers are prohibited from any retaliation against complainants or whistle-blowers, even if there is no explicit non-complaint clause in their contract.

5 Risks of unintended harm

In a previous paper, we proposed that there should be some potential for firms to make an objective justification defence for breaching an obligation, but on the relatively narrow grounds that compliance would harm fairness and/or contestability, and thus act contrary to the objectives of the regulation. Arguments based on the impact of the firm having lower revenues or higher costs, due to the regulation, would not be included.

In Table 1 above, we set out that many Obligations appear to be at least partially targeted at limiting unfair leverage into related markets (even if this is done via the fairness objective). As discussed above, **if this unduly restricts the ability of gatekeepers to enter new markets, then this has the potential to harm contestability in these related markets, rather than enhancing it**. This is a key risk to a core objective of the DMA. However, it is arguably addressed by our earlier recommendation.

Besides, drawing on the analysis in Table 3, there are many **other possible risks** of unintended harm arising from one or more obligations. These include:

[121] This recommendation links to the recommendation in the CERRE issues paper on institutional design which called for more involvement of national authorities, including data protection authorities.
[122] We have made both recommendations (that consent needs to be fine granular and that consent should be more standardized) in this CERRE report: https://cerre.eu/publications/report-making-data-portability-more-effective-digital-economy/.

- Risk to the **effectiveness of targeted advertising**.
- Risk to innovation, due to **overly restrictive technical requirements**.
- Risk that the '**consumer journey' is less smooth** than currently.
- Risk that **prices increase** for some elements of service. These could potentially fall disproportionately on vulnerable consumers, for example, if device prices increase or fees are introduced for currently free services.
- Risk of **increased refusal to deal** with particular business users and further integration into related markets.
- Risk to **privacy** and data protection.
- Risk of harm to **system integrity**.

The latter two categories of risk are largely **mitigated** by the formulation of the obligations, and the Article 9 public interest exemptions. Concerning the remaining risks, a degree of mitigation is provided by the proportionality requirement under TEU, which requires that the objectives of the DMA are achieved in the least restrictive way possible. The risks above would presumably be relevant to assessing the extent to which different measures for meeting DMA obligations are restrictive. That said, it is not clear why integrity is not included as a condition in Article 6(1)(f), and this would be useful to change.

There is also a general risk that these obligations, which involve substantial system change, could lead to **programming errors and a worse service to all users**, including potential security risk. This risk is exacerbated by the required speed of change. The incentives of the gatekeepers are aligned with their users in this area, and they will endeavour to **mitigate** this risk so far as possible. But mistakes could happen. This risk may be mitigated by recommendation (n) above, under which the Commission would have the discretion to provide longer timescales for implementation.

Finally, the much-stated **free rider concerns** relating to these various obligations would seem to be **minimal**, so long as they only apply (as is proposed) to the relevant CPS of the designated gatekeepers.

Annex: Assessment of individual obligations

Ob.	Summary of obligation	Likely effectiveness	Practical issues for specification and assessment	Risk of unintended harm
5a	No data fusion without user consent	**Likely for fairness,** although noting the need to ensure that consent is genuine. Gatekeepers are in control of requesting consent and will have an incentive to design choice architecture to encourage it. Consent may not be meaningful if the choice is 'take it or leave it'. Also, should consumers be required to give consent to each data source separately. Otherwise, risk that they do not express their true preferences. E.g. they may be happy sharing data with Google generally, but not their Fitbit data. **Maybe for contestability**. Risk that user consent will still be given fairly easily, and thus there will be no real impact on data-driven platform envelopment.	**Clarity issue:** Specification not allowed, but a key clarity question will be what constitutes active consent for this obligation, and how to assess whether consent choice architecture is appropriate. **Ongoing compliance supervision issue:** How to assess whether data is being shared across services, in contravention of consumer consent, in practice.	Risk that consent process makes consumer journey less smooth. Risks harming contestability where gatekeepers are the most likely entrants into new, or currently monopolised, markets, since it removes an efficiency benefit related to such entry. If effective in limiting data aggregation, the downside could be less effective online advertising, which in turn could limit contestability in business user markets.
5b	No wide MFN/parity clauses and no exclusive dealing	**Likely**. MFNs make it harder to enter/expand via offering lower prices/different terms. Note that the ban does not relate to narrow MFNs, which reduces the potential for increasing contestability via platform disintermediation in the form of direct supply. The exclusive dealing provisions would arguably be valuable beyond the narrow scope of online intermediation services.	**Ongoing compliance supervision:** How to identify circumvention - e.g. via giving higher ranking/prominence to business users who don't price lower elsewhere.	Some risk that loses a benefit of MFNs in relation to preventing exploitation of greater willingness to pay off, e.g., Apple device users. But unlikely to be a major issue if plenty of competition between business users. Some risk of increased incentives for a gateway to vertical integrates in the business user market itself, which could be bad for contestability. NB: Only limited risk of free-rider effects undermining viability, so long as applicated limited to regulated CPS (where gatekeeper is strong).

5c	No anti-steering	**Likely for fairness. Maybe for contestability.** In practice, steering may be limited by consumer inertia - they may simply find it easier to transact/contract via the CPS. Consumer's trust in the CPS may also limit consumers from engaging with business users outside the CPS.	**Clarity issue:** The examples in the Impact Assessment relate to the app stores. Not sure if/how the second half of the obligation applies to marketplaces. The first half potentially could, but not clear, but does this mean the first half doesn't either? Also, presumably the second half is only required if a subscription is also available through the app store. Otherwise, could this require investment in extra functionality? **Timing question:** Any potential for time extension? Could be technically risky to do in 6 months. **Ongoing compliance supervision:** how to identify circumvention, in the form of the gatekeeper offering incentives to achieve the same end.	If this were to apply to subscriptions/services/offers not available on the app store, this might be technically complex, creating risks of technical errors. Risk that this might increase incentives for a gateway to vertically integrate into the business user market itself, which could be bad for contestability. NB: Only limited risk of free-rider effects undermining viability, so long as applicated limited to regulated CPS (where gatekeeper is strong).
5d	No prevention of raising issues with public authorities	**Likely**.	**Upfront issue:** Need to establish clear, anonymised whistleblowing processes. Users may otherwise still be cautious about raising issues. Also, clarify that gatekeepers are not allowed to retaliate against complaints/whistleblowers.	--

5e	No tying to business users from CPS to ID services	**Likely for intermediation services,** subject to no significant GDPR issue arising. **Maybe for social log-in services**, since even absent tying, business users may still have an incentive to offer popular social log-ins since this potentially widens their user base.	**Clarity issue:** The Impact Assessment refers to both social login services like "login with Facebook" and also the requirement by intermediation services that business users utilise their user ID. But if the latter is in scope, are there no GDPR issues that need addressing, or is the purchase process tantamount to giving consent for the associated data sharing?	Risk of less smooth consumer journey: Less easy sign-in for consumers if gatekeeper ID service is not an option. Risk that third-party ID services are less trustworthy. Risk that requiring consumers to use additional passwords deters usage of third-party sites, thus reducing contestability.
5f	No tying from CPS to other CPS	**Likely for business users. Maybe for end users**, since they may well just sign up anyway – that is, the process of signing up may be a relatively small inhibitor, especially if only need to sign up to each CPS once. NB Not clear that it applies to agreements between gatekeepers and OEMS, even though it seems to derive from the Google Android/Google Play concern.	**Clarity issues:** Does this requirement cover CPS pairs for which it makes little sense (e.g. app store and OS)? Hard to see how an end user could sign up to an app store without signing up to the OS. Also, does it cover OEMs (are they business users?). If so, for new contractual agreements with OEMS or existing ones?	Risk of Less smooth consumer journey: End users don't like the requirement to sign up to services separately. Also, if effective in separating end user decisions on search/social networks from decisions to receive advertising, then could reduce effectiveness of online advertising, which could in turn limit contestability in advertisers' markets.
5g	Price transparency for ads	**Likely**, although risk that pricing provides limited benefit for advertiser decision-making, as it is inherently only evident after the event, and the past may not be a good guide to the future. But should still help a rival CPS to prove its relative value for money.	**Clarity issue:** Specification not allowed, but may need some oversight of format for disclosure. In particular, there are various stages in the ad tech supply chain, some of which are more contestable than others. If this obligation is to open these up, prices for each stage need to be disclosed, not the price of the bundle.	—

6.1a	No use of data related to business users to compete against them	**Maybe**, albeit may be hard to police in practice.	**Ongoing compliance supervision:** Identifying and evidencing such use of data is very hard.	Could be argued that there is a risk of limiting competition in the business user market by restricting entry/expansion by the gatekeeper. But not very credible – this obligation just puts any such rivalry on a level playing field.
6.1b	Allow un-installing of apps, unless essential to OS/device	**Maybe**. Key benefit is that it is likely to incentivise gatekeepers to include the app in the app store, which in turn brings additional requirements. Also, ability to uninstall could reduce default effects ("if it has to stay, I might as well use it"). But consumer inertia may well limit effectiveness in practice, as may 'essentiality' condition. The ability to uninstall may also address privacy concerns around tracking/surveillance.	**Specification issue:** How to assess what is required for OS to function. Ongoing compliance supervision: How to assess circumvention when an obvious route would be to move elements of OS into apps, to make these indispensable for the functioning of the device.	
6.1c	Allow 'side loading' of third-party apps or app stores, unless threatens integrity	**Maybe**, but risk that limited by consumer inertia. Risk that integrity concerns could be overstated (after all side-loading is possible on desktop).	**Specification issue:** How to assess integrity concerns.	Risk of lack of coordination between third-party apps and gatekeepers resulting in weaker app performance and/or harm to innovation (in apps or OS). Integrity risk may not be fully mitigated.
6.1d	No self-preferencing in rankings	**Maybe**, but EC cases show that 'self-preferencing' can be hard to define in practice, especially in paid-for rankings, where the gatekeeper can always pay more for rankings given that it keeps the proceeds. Not clear that obligation will bite on Amazon giving preference to sellers who are 'Fulfilled By Amazon' (FBA) or Google giving preference to Accelerated Mobile Pages (MP) in search rankings.	**Specification issue and ongoing compliance supervision:** Guidance on how to ensure that ranking criteria used are genuinely fair and how to ensure that 'paid for' rankings are not distorted by gatekeepers being active on both sides of the market.	Risk that could limit innovation if can't give prominence to new proprietary products without established history, but this could appear as bias. Also could limit benefits of free fast delivery if FBA and AMP can't be preferenced.

6.1e	No technical restriction of switching or multi-homing across apps using OS	**Likely**, although possible there may still be non-technical restrictions.	**Clarity issue:** Would this include the ability for consumers to change defaults within OS – e.g. changing default map for Apple calendar to Google Maps? **Ongoing compliance supervision:** How to identify a technical restriction?	Possible risk to innovation if it makes gatekeepers less willing to introduce new functionality for some apps, because they would also have to ensure it didn't inhibit switching/multi-homing.
6.1f	Access and interoperability for business users and ancillary services to OS should be as for proprietary ancillary services	**Likely for payment services,** albeit possibly a problem that no obligation on the pricing of access, and a risk that Art 9(2) public security concerns are overstated. **Maybe for other business users and ancillary services**, but what are these? Should this provision apply to all apps that come pre-installed?	**Clarity issue:** Why no reference to integrity concerns here? Also is Commission able to limit applicability to particular ancillary services through the specification process? **Ongoing compliance supervision:** Complexities of assessing access price. Art 9(2) public security concerns likely to be raised - how to assess these?	Risk that interoperability requirement unduly limits innovation, especially if far more wide-ranging than payment services.
6.1g	Performance transparency for ads	**Likely**, except risk that GDPR implications are overstated, which limits independent validation.	**Specification questions:** May need to oversee format. In particular, there are various stages in the ad tech supply chain, some of which are more contestable than others. If this obligation is to open these up, performance at each stage needs to be disclosed, not the performance of the bundle. Further specification needed on who gets to see what - e.g. do content providers on YouTube get to see what adverts are placed, or just the associated revenues? For external validation, data sharing formats and APIs need to be developed. **Ongoing compliance supervision:** Assessment of GDPR issues.	---

6.1h	Provide real-time data portability for end-users	**Maybe**. As currently framed (unless the word 'effective' is doing a lot of work), there is no requirement to use Open APIs or to provide data in a consistent format over time. No requirement for direct transfer of data to third parties, rather than via end user. (Unless all of this done via specification process.) More generally, risk of consumer inertia and lack of consumer trust. Might be helped if a clear requirement for the gatekeeper to have an easily accessible dashboard of consents, with easy cancellation – but this is not currently required. GDPR arguably only requires portability for input data, but contestability needs observed data too.	**Clarity issue:** Obligation needs strengthening along the grounds in the previous column. Also, is it required to ensure portability of all data – it is arguably disproportionate? Can this be narrowed through the specification process? [NB How to fit with data portability requirement for cloud services in Free Flow of Data Regulation (for Iaas/Paas).] **Specification question:** Oversee format for data porting, and potentially agree on what data are in scope. **Timing question**: Any potential for a time extension for delivery - could? Could be technically risky to do in 6 months. Is it required to ensure portability of all data – it is arguably disproportionate?	Risk that consumers give uninformed consent, and privacy is compromised. Risk of data leaks or abuse by third parties and lack of redress.
6.1i	Provide real-time data sharing for business-users	**Maybe**. GDPR requirement and gatekeeper control over the consent process could mean only aggregated data is available, and it is unclear how useful this will be.	**Clarity issue:** What does 'or' mean - can gatekeeper just provide aggregated data if it fancies? **Specification question:** Oversight of format for data sharing. And potentially of what data are in scope. **Ongoing compliance supervision:** Risk that gatekeepers make the process too cumbersome, despite the requirement that data access is 'high quality'. Oversight needed over consent process? **Timing question:** Any potential for time extension? Could be technically risky to do in 6 months.	Risk that consumers give uninformed consent, and privacy is compromised.

6.1j	Data sharing obligation: FRAND access to click and query data	**Likely**, albeit some questions around effectiveness. How much the usefulness of the data would be harmed by fact that there is no requirement to adopt a consistent or Open API approach to data-sharing (unless this is implicit with the requirement of FRAND terms), and no explicit requirement that data be real-time or even recent? Or by there not being an explicit requirement to give access to all queries, click and view data, as opposed to a subset Also not clear how much usefulness of data will be limited by anonymisation process.	**Clarity issues:** Is 'reasonable' element in FRAND sensible to include (NB missing in 6.1k)? Addressing effectiveness issues around requirements. **Specification issues:** Oversight of any anonymisation process. Guidance on how to set FRAND terms?	Risk that anonymisation is not effective, and privacy is compromised.
6.1k	Fair and non-discriminatory terms of access to app stores	**Maybe**. Not clear how to define 'fair and non-discriminatory. Risk that still effectively favours own apps - e.g. in setting fees, and other terms of access, it is hard to overcome the incentive effects of gatekeeper acting on both sides of the auction.	**Specification issue:** What is meant by fair and non-discriminatory terms in specific circumstances? (E.g. is it okay to charge nothing to free apps?) More thought is needed on how to ensure that terms of access are 'fair' in the context of the gatekeeper being active on both sides of the market.	Risk of harm to business users (and their customers) that currently get a good deal (e.g. free apps who pay nothing). Risk of consumer harm due to free apps ceasing to be free if fees to them increase. Could impact vulnerable consumers. Some risk of app stores deciding not to carry certain apps, or offer certain functionality.

FOURTH ISSUE PAPER
ENFORCEMENT AND INSTITUTIONAL ARRANGEMENTS

Table of contents

1 Introduction

This paper focuses on the enforcement and the institutional arrangements in the DMA.

The paper is divided into five sections: after the Introduction, Sections 2 and 3 deal with public enforcement, its modes, and its degree of centralisation; then Section 4 focuses on private enforcement; and finally, section 5 elaborates on the relationship between the DMA and competition law enforcement. The purpose of each section is to tease out ways in which the proposal may be improved.

2 Public Enforcement: Design and Modes of intervention

2.1 Enforcement pyramid after Article 7

2.1.1 Regulatory design and enforcement pyramid

Gatekeepers have six months after designation to comply (Article 3.8 DMA). In the first issue paper, we suggested that the gatekeeper may seek guidance from the Commission, which would come in the form of a specification decision for Article 6 obligations (building on Article 7.7 DMA). The Commission may also intervene by decision at this early stage without prior notification by the gatekeeper and prescribe a specification (Article 7.2 DMA).

This initial step in compliance (the so-called "regulatory dialogue" referred to in several recitals of the DMA) is the major first step in fixing the way a gatekeeper should comply with the obligations arising from Articles 5 and 6. **The procedures in Article 7 possibly denote the principal step in setting out obligations that respond to the policy goals of the DMA, but at the same time, ensuring that they are designed in a manner that does not unduly hamper the business freedom of the gatekeeper**. As we explained in the first discussion paper, this procedure should be reformed to make the regulatory dialogue more effective.

In this section, we discuss the steps that are set to take place *after* this initial regulatory dialogue has been concluded. The DMA draws on a mix of competition law enforcement features and enforcement styles found in other regulatory fields. However, its regulatory design is unclear. A helpful and widely adopted paradigm in designing enforcement structures is that of **responsive regulation**.[123] This is contrasted with a punitive enforcement structure that we find in antitrust laws. The responsive model matches somewhat the enforcement design in the DMA. Under this framework, the regulator sets up an enforcement pyramid (see Figure 1 below). If the legislator had intended this for the DMA, then the **enforcement pyramid** would have entailed the following elements:

- The assumption that serves as the base of the pyramid is that the gatekeeper wishes to comply; so the regulator engages with the gatekeeper to secure clarity as to what is expected of it;
- If there is a failure to comply, the regulator climbs up the pyramid and has ever-stricter sanctions at its disposal that may be imposed on the gatekeeper to secure compliance;
- At the top of the pyramid is the harshest penalty, a so-called benign big gun (i.e. a remedy which is very intrusive but serves as a credible threat so that its use is only necessary in cases of extreme failures to comply).

The enforcement structure is portrayed as a pyramid because it is expected that most of the enforcement occurs in the lower steps, with fewer cases moving up. The smart regulator will move up and down the pyramid in response to how the gatekeepers react to its signals. The figure below

[123] This draws, generally, on I. Ayres and J. Braithwaite, *Responsive Regulation* (Oxford University Press, 1992).

is taken from the work of Ayres and Braithwaite who have pioneered this regulatory style and we have superimposed the enforcement framework of the DMA.

2.1.2 Enforcement steps in the DMA

Turning from the pyramid to the DMA, the Commission's proposal does not correspond precisely to the responsive model outlined above.

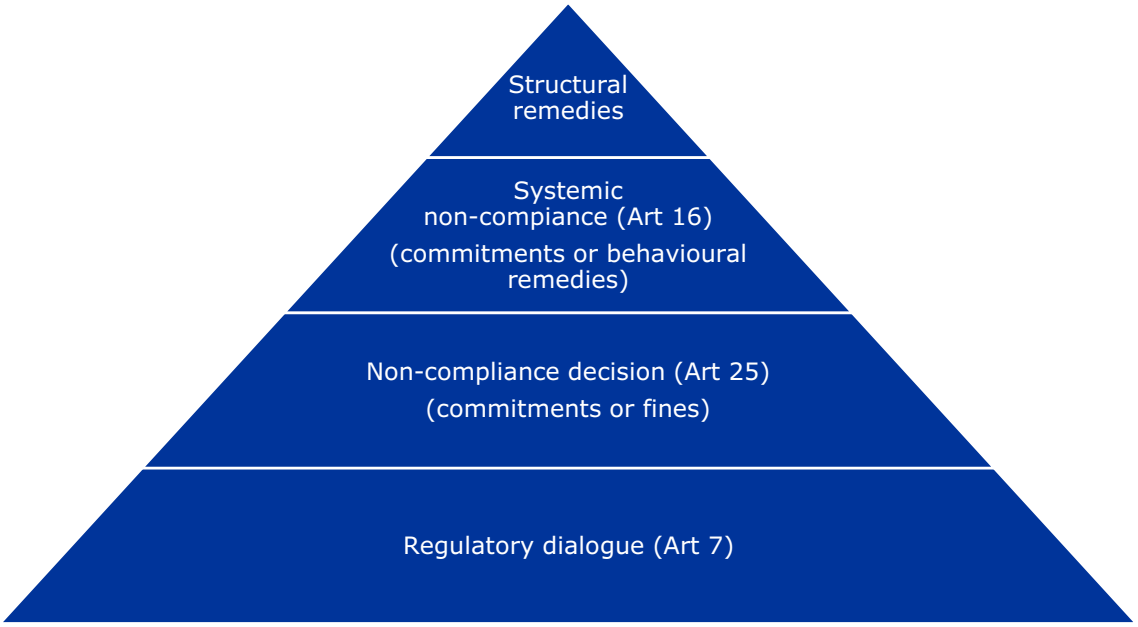

Figure 1: enforcement pyramid in the DMA.

(1) The first step is the *regulatory dialogue* where we expect most of the compliance efforts to be devoted. However, already at this stage, the Commission is empowered to impose, unilaterally, a specification for how a gatekeeper is to comply with Article 7 even when the gatekeeper does not request a specification. This unilateral imposition is premature. It is a step we would expect to be used at the third level of the pyramid, but not here. Instead, Article 7 should allow the gatekeeper to offer commitments. The absence of a commitment path may just be an oversight because the Commission, before adopting a decision, is expected 'to explain the measures it considers to take or it considers the provider of core platform services should take in order to effectively address the preliminary findings.'[124] This appears to be an invitation to make commitments.[125] In sum, **the regulatory dialogue under Article 7 should only allow for a consensual conclusion where the gatekeeper has a say in the design of compliance. The intensity of this dialogue remains up for discussion**:

- A minimalist approach is that parties seeking specification provide the Commission with a proposal, which the Commission may accept or vary;
- An intermediate solution is that parties seeking specification provide the Commission with a proposal, which the Commission may deem insufficient to comply with the gatekeeper's Article 6 obligations, at which stage the gatekeeper may offer commitments;
- A maximalist approach is that parties and the Commission engage in a co-regulatory process where the design of the compliance path is more cooperative. This could be inspired by the approach in the DSA discussed below.

[124] DMA, Article 7(4).
[125] DMA, Article 23 does not foresee commitments for Article 7 procedures. It allows these only for non-compliance and systematic non-compliance decisions.

The **gatekeeper should be able to make commitments during an Article 7 procedure when the Commission initiates it**.[126] As delineated in the first issue paper, this step would also help clarify the cases when the Commission is unlikely to accept commitments (e.g. in cases where compliance was straightforward, the Commission may consider that a fine is an appropriate remedy).[127] To compare, commitments in competition law are said to be acceptable to the Commission only for instances where it does not intend to impose a fine.[128]

Also, the Commission should learn its lessons from the commitments procedure in competition law. Early on the process was unstructured and it was noted that parties might either make commitments that were more than necessary to remove the concerns just to ensure regulatory clearance or exploit the asymmetry of information to make insufficient commitments. A **best practice soft law document** similar to those drafted by some national competition authorities **can assist in making the process clear** for the parties as well as for third parties who should be involved in a market test. **Alternatively, the DMA could itself be more explicit on the different procedural steps to be followed by the Commission before accepting commitments** as it is the case in the new Electronic Communications Code.[129]

(2) The second step empowers the Commission to commence a *non-compliance procedure*, which may be closed by the parties offering commitments. If none are presented or if the commitments offered are rejected, the remedy is a cease and desist order to which a penalty may be added.[130] In keeping up with the spirit of communication, even in cases of an infringement decision, the gatekeeper is obliged to provide 'explanations on how it plans to comply with the decision.'[131]

In this second step, the Commission threatens a punitive measure but remains open to the gatekeeper offering commitments and avoiding the fine. As we suggested in the first paper, however, it **may be preferable that the option to offer commitments at this second stage is reserved for parties who have not received a specification decision during the first step**, i.e. the regulatory dialogue.

(3) In the third and fourth layers of the pyramid, the Commission may step up enforcement if there is *systematic non-compliance*. This is defined both formally (there must have been three non-compliance or fining decisions in the past five years) and by reference to the effects of the conduct in question ('where its impact on the internal market has further increased, its importance as a gateway for business users to reach end-users has further increased or the gatekeeper enjoys a further entrenched and durable position in its operations.')[132] In these situations, the Commission is still open to receiving commitments but if none are forthcoming then it may 'impose on such gatekeeper any behavioural or structural remedies which are proportionate to the infringement committed and necessary to ensure compliance with this Regulation.'[133] The **big stick of behavioural or structural remedies, however, may only be levelled after a market investigation has been undertaken and it looks like a decision that is far down the line given all the options for compliance that the gatekeepers are offered**. Structural remedies are only available when behavioural ones are unsuitable (Article 16.2).

Given the two layers of non-compliance, we would expect lower fines for the first offences, so that the higher levels of fine would only be for instances where the gatekeeper does not comply with behavioural remedies imposed after a market investigation for systemic non-compliance. Conversely, as suggested in the first discussion paper, we would also expect that

[126] An alternative could be that the Commission's power to initiate an Article 7 procedure is removed, after all, it seems unlikely that the Commission will know ex-ante what gatekeepers are planning to do to comply.
[127] First discussion Paper, points 13 and 25
[128] Regulation 1/2003, Recital 13.
[129] EECC, Article 79.
[130] DMA, Articles 25(3) and 26.
[131] DMA, Article 25(3).
[132] DMA, Article 16(3) and (4) respectively.
[133] DMA, Article 16(1).

the Commission would be open to commitment decisions in lieu of fines when parties have not obtained a specification decision.

It may be argued that systemic non-compliance should **prevent the gatekeeper from making commitments**. At this stage, the gatekeeper has revealed an unwillingness to be bound and it may appear overly generous to allow it to make commitments this late in the game. Perhaps the **settlement submission found in competition law (whereby parties agree to a specified compliance path in exchange for a reduced fine) would be a more appropriate mechanism** in the DMA at this final stage.[134] This would retain the responsive element by encouraging gatekeepers to explain how they will change their conduct to comply as well as a punitive element.

2.2 Enforcement modes

The oversight of the digital gatekeepers and the enforcement of the DMA will be extremely difficult because the digital sector is complex and fast-moving, the asymmetry of information between the Commission and the gatekeepers tends to be large and the deadlines for action are tight. Therefore, oversight and enforcement need to be modelled on regulation rather than antitrust.[135] **DMA enforcement could be made more collaborative (without, however, leading to regulatory capture) and based on an "ecosystem of enforcement" where the regulator orchestrates the meeting of the public interest and the supervision of the rule by the platforms and their (business and end) users.[136]** To achieve such modes, DMA has a lot to learn from the companion DSA proposal.[137]

The DMA proposal already provides for some rules that **incentivise the regulated gatekeepers to cooperate with the Commission**. The gatekeeper presumption based on financial and users size incentivises the platforms to disclose to the Commission relevant information (for instance, on their users lock-in or the entry barriers) if they want to rebut the presumption. Similarly, the specification of the obligations encourages the Article 7 regulatory dialogue. Also, the enforcement pyramid with graduated sanctions in case of violation of the obligations encourages compliance.

However, given the difficulty of oversight and enforcement, those rules may not be enough and need to be **complemented with other tools**. As suggested in the first issue paper, the specification process of the obligations should more explicitly and clearly involve the regulated gatekeepers. The DMA could also explicitly provide that the Commission can request that a gatekeeper tests different designs for measures or remedies (A/B testing) and report on their effects so the Commission could decide what are the most effective measures or remedies.[138] Moreover, the DMA could impose more internal compliance mechanisms as has been proposed in the DSA. Those mechanisms may include the requirement to perform regular risk assessment of the corporate practices,[139] perform a regular independent audit,[140] or to appoint compliance officers.[141]

Next to the regulated gatekeepers, the Commission could also be supported by the other stakeholders, in particular the business users of the regulated gatekeepers as well as

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[134] This was introduced in CASE AT.39759 *ARA Foreclosure* (2 September 2016). It has been used in a number of instances of vertical restraints, dealing with geo-blocking and resale price maintenance. For discussion, see Monti, 'Keeping Geo-Blocking Practices in Check: Competition Law and Regulation', TILEC Discussion Paper 2021-04.
[135] Regulatory modes are well summarized in Draft BEREC Report of 11 March 2021 on the *ex-ante* regulation of digital gatekeepers, BoR (21) 34, Annex IV. The differences between antitrust and regulator enforcement are well explained P. Larouche, *Competition Law and Regulation in European Telecommunications*, Hart, 2000.
[136] See A. de Streel and M. Ledger, *New Ways of Oversight for the Digital Economy*, CERRE Issue Paper, February 2021; French regulators, New regulatory mechanisms – data-driven regulation, July 2019; World Economic Forum, Agile Regulation for the Fourth Industrial Revolution A Toolkit for Regulators, 2020.
[137] Proposal of the Commission of 15 December 2020 for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31, COM(2020) 825.
[138] A/B testing was proposed by R. Feasey and J. Kramer, Implementing effective remedies for anti-competitive intermediation bias on vertically integrated platforms, CERRE Report, November 2019 for implementing effective remedies for anti-competitive intermediation bias on vertically integrated platforms.
[139] DSA Proposal, art.26. Also GDPR, art.35.
[140] DSA Proposal, art.28.
[141] DSA Proposal, art.32. Also GDPR, arts.37-39.

digital platforms providing substitute or complementary services.[142] Currently, the DMA Proposal is silent on the very useful role that those stakeholders could play.

The DMA could clarify how and when business users may lodge confidential complaints without fearing retaliation by the gatekeeper on which they depend, with a process based on the Regulation 773/2004 for competition law infringements.[143] It is vital that a formal channel of communication is established between the Commission and those who wish to signal an infringement. This allows the Commission to design a procedure for making complaints, it gives interested parties the right to participate in proceedings (if they intend to do so) and they can also be informed whether and why their complaint was not followed upon. As opposed to a formal channel, informal means of complaint would damage the integrity of the legal system. The DMA could also give a role to business users and end-users, as well as to providers of substitute and complementary services in the specifications of the obligations, in the market testing of commitments proposed by the gatekeepers and in the design of remedies in case of non-compliance.

The Commission also proposes to appoint '**independent external experts and auditors** to assist the Commission to monitor the obligations and measures and to provide specific expertise or knowledge to the Commission.' This expert can assist in monitoring compliance with 'Articles 5 and 6 and the decisions taken pursuant to Articles 7, 16, 22 and 23.'[144] This is a welcomed development as it will strengthen the Commission's capacity to secure compliance.[145] In order to facilitate such cooperation, the DMA could include a similar provision on data access and scrutiny than the one foreseen by the DSA proposal.[146]

3 Public enforcement: Degree of centralisation

3.1 Justifications for the Commission's central role

The Commission is the sole agent in charge of the application of the DMA. This model is also found in other EU legislation. For instance, the Commission has exclusive competence for concentrations that have an EU dimension (subject to some exceptions).[147] The European Central Bank has exclusive competence to supervise systemically significant banks.[148] There are clear legal bases in the EU Treaties for these two domains.[149] The Code of Conduct on Computerised Reservation systems for airline tickets also operates in this way, with the Commission auditing compliance.[150] **There is a list of arguments in favour of opting for a centralised model when it comes to the DMA**.[151]

- First, several gatekeepers are likely to operate globally, making the EU the most effective level of governance. It is not easy to see how the principle of subsidiarity could lead to a different approach.

- Second, big platforms operate broadly the same systems across all Member States (and indeed globally), due to the economies of scale involved in designing and operating these systems. Therefore, if different National Regulatory Authorities (NRAs) were to require different tailor-made remedies, it would risk leading to a decrease in effectiveness and may

[142] BEREC Opinion on the European Commission's proposal for a Digital Markets Act: For a swift, effective and future-proof regulatory intervention, BoR (21) 35, section 2.1.
[143] Commission Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, O.J. [2004] L 123/18, as amended.
[144] DMA, Article 24.
[145] It is helpful to inscribe this in law to avoid the problem that arose in *Microsoft v Commission*, Case T-201/04, EU:T:2007:289 where the Court quashed the part of the Commission decision requiring the appointment of a monitoring trustee as the Commission had no such powers.
[146] DSA Proposal, art.31.
[147] Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1.
[148] Council Regulation 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63.
[149] Articles 103 and 127(6) TFEU respectively.
[150] Regulation (EC) No 80/2009 of the European Parliament and of the Council of 14 January 2009 on a Code of Conduct for computerised reservation systems OJ L 35, 4.2.2009, p. 47 Articles 13-16.
[151] Also BEREC Opinion on the European Commission's proposal for a Digital Markets Act, section 3.

be impossible to justify based on proportionality. Decentralisation would require investing in mechanisms to prevent divergence whose operation may delay the imposition of remedies further.

- Third, monitoring compliance is likely to be costly and may require careful large-scale data analysis or direct review of algorithm design. It is highly unlikely that individual national regulators will be well set up to do this, and even if they were it would be highly redundant to do it more than once. This seems to be reflected in the weakness of some national authorities that apply the General Data Protection Regulation.[152]

- Finally, the targets of this regulation will be a fairly small number of firms.[153] Moreover, a single regulator can benefit from managing a set of cases in parallel and learn across the different dossiers.

With the adoption of the DMA, the Commission will acquire substantial new regulatory powers. As explained in the CERRE Recommendation Paper, **if the Commission wants to share the same characteristics that the EU law imposes upon regulatory authorities at the Member State level**, it should have **sufficient budgetary and human resources**. The Commission foresees a team of 80 FTE in 2025[154] but that may not be sufficient given the strict deadlines that the Commission will be subject to.

Moreover, a key feature of the DMA is to give to the **Commission extensive investigation powers on database and algorithms**. Those new powers will be very useful given the importance of data and algorithms in the conducts and the impact of the gatekeepers. However, these investigation powers could only be **exercised effectively if regulators have the human and technical capability of analysing and interpreting the large volumes and variety of data provided by the platforms**.[155] Regarding **human capabilities**, the Commission could set up in-house dedicated teams of data analysis and AI specialists as national authorities are increasingly doing.[156] Regarding **technological capabilities** and following the Commission White Paper on AI,[157] regulators may also develop their own AI tools to process the data to be analysed. In practice, AI techniques are increasingly used by financial regulators[158] and are starting to be used by competition agencies.[159]

The Commission should also be **independent** of the regulated platforms but also from political power: this independence requirement may be in contrast with the geopolitical role that the Commission is increasingly eager to play; thus the old debate on the political independence of DG COMP and the need to create an independent EU antitrust agency may come back with a vengeance as the Commission acquires more regulatory power and, at the same time, wants to become more political. And lastly, the Commission should be **accountable**: this may imply more hearings of the Commission department in charge of the DMA before the Parliament and strict judicial review of its decisions.

The new DMA powers will also have to be combined with the existing competition powers and the new DSA powers. The Commission should **maximise the synergies between its different**

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[152] Accessnow, *Two Years Under the EU GDPR: An Implementation Progress Report* (2020).
[153] The Commission suggests 10 to 15 but the basis of this estimate is questioned. See CERRE, above n 4, p.13.
[154] Commission Explanatory Memorandum to the DMA Proposal, p.11.
[155] For instance, in the Google Shopping antitrust investigation, the Commission had to analyse very significant quantities of real-world data including 5.2 Terabytes of actual search results from Google (around 1.7 billion search queries): Commission Press Release of 27 June 2017.
[156] For instance, the French authorities have set up the Pôle d'expertise de la régulation numérique which offers digital expertise to the French regulatory administrations and the French Competition Authority has established a digital unit. In the UK, the CMA has set up CMA's a Data, Technology and Analytics (DaTA) unit and Ofcom has created an Emerging Technology directorate and data science team.
[157] Communication White Paper of 19 February 2020 on Artificial Intelligence - A European approach to excellence and trust, COM(2020) 65, p.8.
[158] See for instance the Data Science/Artificial Intelligence (Datalab) excellence hub created in 2018 within the French financial regulator. See also the Conference organised by the Club of Regulators in cooperation with the OECD Network of Economic Regulators, *RegTechs: Feedback from the First Experiments*, available at: http://chairgovreg.fondation-dauphine.fr/node/708.
[159] See T. Schrepel Computational Antitrust: An Introduction and Research Agenda, Computational Antitrust project at Stanford University, CodeX Centre - The Stanford Centre for Legal Informatics, 2021.

powers (which are based on different legal instruments) especially when they apply to the same digital platforms while being **clear and predictable about how those powers will be applied and combined**. As explained below, the Commission should clarify how it will apply its concurrent existing antitrust and new regulatory powers when a designated gatekeeper also enjoys a dominant position. The DSA proposal will also confer important new investigation and sanctioning power to the Commission against Very Large Online Platforms which may include some gatekeepers. The DMA - and then the practice Commission - should clarify how the information received during a DSA investigation could be used for a DMA investigation. It should also explicate how the obligations which could be imposed under the DSA (especially the new transparency requirements on online advertising and on recommender systems)[160] will complement and support the objectives and obligations imposed under the DMA.[161]

Given those synergies with the DSA enforcement and the hybrid character of the DMA (which is a regulatory tool with complementary objectives to those of competition law and with many obligations determined on the basis of past antitrust cases), the best solution might be that, within the Commission, a **joint task force composed of DG CONNECT, COMP and GROW** is in charge of enforcing the DMA.[162]

3.2 The role of Member States

Having said that, two countervailing considerations arise. First, the general pattern of EU Law enforcement is decentralised, thus the DMA belongs to the 'minority' of EU rules that are applied centrally. Second, it is not always clear why a particular institutional architecture is chosen.[163] The functional rationales offered above may not play a determinative role as the DMA is negotiated: Member States may prefer more powers for national agencies as a means of exerting control, or they may favour centralising matters in the hands of the Commission to signal a commitment to regulation. It remains to be seen whether the Council or the European Parliament will plead for a decentralised system. **In the Commission proposal, the role of Member States is limited to three main tasks**.

- First, three or more Member States may request that the Commission open a market investigation to determine if a core platform provider should be designated as a gatekeeper.[164]

- Second, Member States partake in the Digital Markets Advisory Committee (DMAC) which is to be instituted to assist the Commission.[165] However, this committee only comes into operation rather late in the process (e.g. in a market investigation or enforcement actions) which may well play a marginal role in the day-to-day supervision of gatekeepers if they are willing to comply.[166]

- Third, if the Commission adds new obligations and prohibitions with a delegated act, the standard dual control by the Member States on the adoption of delegated acts applies: before the adoption of the act, representatives of the Member States should be consulted by the Commission and after the adoption of the act, the Council of the Ministers of the EU may oppose to such an act.[167]

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[160] Prop DSA, arts.29 and 30.
[161] Although the Impact Assessment (at paras. 410-413) calls for separation of the two enforcement mechanisms because of different objectives, competences and level of centralisation.
[162] Similar to the joint Article 7 task force with CONNECT and COMP in telecom in 2003-2006. See also P. Marsden and R. Podszun, *Restoring Balance to Digital Competition – Sensible Rules, Effective Enforcement* (Konrad-Adenauer-Stiftung e. V. 2020) ch.4.
[163] See the illuminating discussion by L. Van Kreij, 'Towards a Comprehensive Framework for Understanding EU Enforcement Regimes' (2019) 10 European Journal of Risk Regulation 439.
[164] DMA, Article 33. The logic behind this is that gatekeepers should provide a core platform service in at least three Member States, see Article 3(2)(a).
[165] DMA, Article 32.
[166] This committee will advise, with non-binding opinion, the Commission on the following implementing decisions: designation of gatekeepers; suspension and exemption of obligations; imposition interim measures; acceptance of gatekeeper commitments; and condemnation for non-compliance or systematic non-compliance.
[167] DMA Proposal, art.37(4) and (6).

The involvement of the national authorities through their participation in the DMAC or the ex-ante and ex-post control of delegated acts may not be sufficient given the considerable difficulty of enforcing the DMA obligations effectively. If greater role was sought after by Member States, then a national authority would be entrusted with discharging this role. Two main models are possible.

In the minimalist model (which seems to be favoured by BEREC),[168] **DMA remains enforced centrally by the Commission and the national authorities come in support of the Commission**. National authorities may be particularly helpful for the following tasks for which they may have a comparative advantage vis-à-vis the Commission.

- First, national authorities are more localised than the Commission, hence may receive **complaints** more easily from small and local business users. The national authority may receive such complaints and, when justified, forward them to the Commission for further action.

- Second, national authorities may have expertise and experience which can usefully support the Commission in **specifying the obligations**. Indeed, several national authorities have expertise in dealing with digital platforms as well as data and algorithms; they also have experience in implementing some of the obligations of the DMA proposal such as interoperability, access to data or data portability.

- Third, national authorities may be closer to the 'field' and more easily **monitor the correct implementation** of the imposed obligations.[169] Essentially, as suggested by BEREC, the national authorities may play a key role in running a mechanism to **resolve the dispute** between the designated gatekeepers and their business users.[170]

In the maximalist model (which has been supported by some NCAs), **the DMA would be enforced centrally by the Commission but it could also be enforced locally by the national authorities**. Under this model, the DMA will be enforced in the same manner as EU competition law. Different versions of this model are possible:

- National authorities can apply **all measures of the DMA** in parallel with the Commission, hence they may designate gatekeepers (under article 3) and apply and specify obligations (under articles 5-7);
- National authorities can **apply and specify obligations** (under articles 5-7) in parallel with the Commission, but the Commission keeps the monopoly of gatekeeper designation;
- National authorities **only enforce infringements** - so the Commission is exclusively competent to make the specifications in Article 7 or commitment decisions in non-infringement procedures; once obligations are specified the Commission or NCAs can police these together.

The more powers are given to the national authorities, the greater the risk of divergence and the more investment has to be made in building up cooperation networks, which may be costly to be set up. It also assumes that all national authorities are equally capable, well-resourced and independent to apply the DMA. Furthermore, it is not clear whether a national authority would be able to impose a fine or a remedy outside its borders. Granting enforcement powers to national authorities means that the country of origin principle should apply, by which one national authority would have powers to enforce the DMA against the gatekeeper based established in its Member State, but the remedies would be EU-wide.

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[168] BEREC Opinion on the European Commission's proposal for a Digital Markets Act, section 3.
[169] As it has sometimes be practiced under the Merger control: *NewsCorp/Telepiu*, Decision of 2 April 2003, Case M.2876, para. 259.
[170] BEREC Opinion on the European Commission's proposal for a Digital Markets Act, section 2.5.

Conversely, the less power is given to the national authorities, the fewer incentives they may have to invest time and resources in the DMA implementation. To work effectively, the national regulators would have to be empowered to enforce the DMA against firms directly, with the concomitant need for coordination mechanisms.

Finally, it is key that the **national authorities supporting the Commission are independent of political power to alleviate a politicisation - or a perception of it – of the interventions against the digital gatekeepers**. While such independence is expected by the Commission,[171] it is by no means guaranteed by its proposal because the DMAC is a comitology committee whose members should be representatives from the Member States, but not necessarily from their independent authorities.[172] In practice, national representatives in comitology committees are often coming from Ministries. To deal with such issue, some EU sector-specific regulation such as telecommunications, provides for two different networks of national authorities, one comitology committee and another one composed of independent authorities.[173] In the same vein and as advocated by BEREC,[174] the **DMA could establish, next to the DMAC, a network of independent national digital authorities**. It would then be up to the Member State to decide which (existing or new) national authorities should be designated as their National Digital Authority in such network.

4 Private enforcement

4.1 The role of private enforcement in P2B relations

The **P2B Regulation**, which applies horizontally to the providers of two types of Core Platforms services: intermediation services and search engines, is based on a similar philosophy to the DMA: securing fair relations between platforms and businesses. In order to achieve this, the P2B Regulation **foresees private enforcement**.

- Online intermediation service providers shall provide an **internal system for handling complaints**, and it is expected that the majority of cases are resolved with this procedure;[175]
- Failing this, the terms and conditions should specify a **mediation** procedure;[176]
- Enforcement may also be by representative organizations or public bodies which may take action in **national courts**;[177]
- The Regulation also encourages the development of **codes of conduct**.[178]

In addition, the P2B Regulation requires amendments or additions to national laws. Member States should 'lay down the rules setting out the measures applicable to infringements of this Regulation and should ensure that they are implemented. The measures provided for shall be effective, proportionate and dissuasive.'[179] However, there is no expectation that new enforcement bodies are established, nor that states are required to provide for public enforcement and fines.[180] **Some**

[171] Impact Assessment (at paras. 192 and 409) refers to independent national authorities as member of the Digital Markets Advisory Committee.
[172] Regulation 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers OJ [2011] L 55/13, art.2.
[173] EECC, art.118 establishing the Communications Committee (CoCom) which is a comitology committee and Regulation 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of the European Regulators for Electronic Communications, OJ [2018] L 321/1.
[174] BEREC Opinion on the European Commission's proposal for a Digital Markets Act, section 3.
[175] Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57, Article 11, recital 37.
[176] P2B Regulation, Articles 12 and 13.
[177] P2B Regulation, Article 14.
[178] P2B Regulation, Article 17.
[179] P2B Regulation, Article 15
[180] P2B Regulation, Recital 46

Member States may opt for public enforcement, but it suffices that courts are empowered to impose 'effective, proportionate and dissuasive' remedies.[181]

Arguments in favour of relying on private enforcement in the DMA claim that the gatekeepers are best situated to internalise the obligation and adjust their commercial practices to secure compliance, while their clients are in the best position to see if there is non-compliance. Private law remedies would serve to deter such conduct (by the award of damages) and would also facilitate compliance (by the issuance of injunctive relief). In many spheres of EU Law, enforcement is left to private actors who serve as private attorneys-general. The Court of Justice of the EU takes the view that private enforcement serves to safeguard both the subjective rights of the victim and the general interest pursued by EU Law.[182]

However, one of the longstanding enforcement problems in B2B relations is that the two contracting parties are often reluctant to use formal rules to enforce contracts.[183] In some instances, businesses prefer informal methods to solve disputes to maintain good relations between each other,[184] while in others, one of the two sides might have a weaker bargaining position and be concerned of reprisals if it complains (the so-called fear factor).[185] Positions may differ in the kinds of markets outlined in the paper, however.[186] We have seen that some undertakings are quite vocal in asserting their position as to how major platforms are hampering their growth.

4.2 Private enforcement in the DMA

As EU Regulations are directly applicable under Article 288 TFEU, it is clear that **claimants may use the DMA to seek remedies in private law (damages or injunctions)**. The DMA may benefit from an amendment with a provision modelled on the P2B Regulation to confirm the role of national courts: requiring Member States to ensure 'adequate and effective enforcement' and ensuring that **courts are able to provide remedies that are 'effective, proportionate and dissuasive**.'[187]

We are agnostic about whether the DMA should also require a set of **informal internal or external mechanisms for solving disputes**, however, when specifying some of the Article 6 obligations, the gatekeeper arguably might decide that it is expedient to create an internal dispute-settlement system which could provide a speedy way to address minor issues. As suggested by BEREC, the DMA could also include external dispute resolution mechanisms, which have proved to be useful in telecom regulation.[188]

When we speak of private enforcement in EU competition law, it is helpful to distinguish between stand-alone actions and follow-on damages claims. The latter is the most frequent and are used in cartel damages claims: the claimant may rely on a competition authority's infringement decision for a finding of infringement and this facilitates claims considerably. This distinction can prove helpful in discussing private enforcement in the DMA.

4.2.1 Follow-on claims

Follow-on claims will be based on infringement decisions made by the Commission (under Article 25) and possibly also following a decision that results from a market investigation for systemic non-

[181] P2B Regulation, Article 15(2). A research from Cullen International done in July 2020 in 14 Member States shows that: national courts are given the role of enforcing the regulation in 11 Member States; the Ministry of Economy will enforce the regulation in France; in the Czech Republic enforcement has been entrusted to the national telecoms regulator; and in Ireland enforcement will be dealt with by the competition and consumer authority.
[182] *Francovich and others v Italy*, Joined cases C-6/90 and C-9/90, EU:C:1991:428 para 33, *Courage v Crehan*, Case C-453/99, EU:C:2001:465 para 27.
[183] See CEPS, *Legal framework covering business-to-business unfair trading practices in the retail supply chain*, (Study for the European Commission 2014).
[184] H. Beale and A. Dugdale, "Contracts Between Businessmen" (1975) 2 British Journal of Law and Society 45.
[185] As discussed in Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, SWD(2018) 138 final (part 1/2) p.26.
[186] This is also why the prohibition of restricting business users from raising issues related to gatekeepers practices with public authorities included in art.5(d) of DMA Proposal is key.
[187] P2B Regulation, Article 15.
[188] BEREC Opinion on the European Commission's proposal for a Digital Markets Act, section 2.5.

compliance (under Article 16). No provision is made to state that non-compliance decisions by the Commission bind national courts and the constitutional traditions among Member States differ as to whether national courts are bound by administrative acts. However, under the principle of sincere cooperation of Article 4 TEU, national courts are expected not to issue rulings that conflict with Commission decisions. In other words, **the national court cannot declare that conduct does not infringe the DMA when the Commission has ruled that it does and, conversely, cannot declare that a conduct does infringe the DMA when the Commission has ruled that it does not**. This might be strengthened by a provision worded like Article 16 in Regulation 1/2003, providing that national courts 'cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated.' This would ensure uniformity.[189]

The major stumbling block for damages claims will be showing a causal link between the infringement and the harm, but it seems premature to build presumptions of harm at this stage, as was done in the Damages Directive.[190]

4.2.2 Stand-alone claims

Some stand-alone claims appear relatively risk-free for the claimant. The **blacklisted clauses of Article 5 are meant to be self-executing** so there is nothing that prevents a business who considers that these have not been complied with to use the courts. **A specification decision under Article 7 will also serve** to crystallize the manner by which the gatekeeper should behave. In these settings, private enforcement would appear fairly straightforward: the affected business can easily show that the conduct of the gatekeeper is out of line with the conduct that is required.

However, **when the Commission resolves an issue with a commitment decision, or where there is no specification decision, then matters are not as straightforward**. In competition law, commitment decisions are not binding on national courts, they have persuasive value only.[191] One would expect the same to apply here.

While it is not impossible for a claimant to run a stand-alone claim for breach of Article 6 of the DMA, this is likely to be costly so we may not expect a significant amount of cases. Moreover, litigation in these instances could yield the risk of divergent interpretations of the DMA. A national court may find an infringement of Article 6 in settings where the Commission might not, or vice versa. In the medium term, we might expect that the Commission issues Guidelines to explain its position on Article 6 and how parties are expected to comply but this does not bind national courts. An amicus curiae provision (like that found in antitrust law) might serve to ensure alignment between the position of the Commission and national courts. However, no hard law alignment is possible in instances where the Commission has not issued a decision.

A further consideration is that a claimant could bring an action using both the DMA and competition law. For example, self-preferencing is also (possibly) an abuse of dominance. This may lead to a situation where the national court rules that there is no breach of the DMA (e.g. the court considers the commitment decision persuasive) but finds an infringement of Article 102 TFEU. This finding may run counter to the Commission's expectation that the conduct at hand falls within the DMA.

5 Relationship with competition law

5.1 Commission concurrent powers

Once the DMA is adopted, the Commission will have concurrent regulatory and competition powers. To **intervene against the conducts of the digital gatekeepers which will (already) be**

[189] A national court uncertain of the soundness Commission decision may make a reference for a preliminary ruling to the ECJ.
[190] Directive 2014/104 of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, O.J. [2014] L 349/1.
[191] *Gasorba SL and Others v Repsol Comercial de Productos Petrolíferos SA*, C-547/16, EU:C:2017:891.

regulated by the DMA, the Commission should rely on its DMA powers as the obligations and prohibitions are compulsory.

The interesting question, however, is **which route the Commission will follow when intervening against courses of conduct that are not (yet) covered by the DMA. Given the concurrency of powers, the Commission should choose between competition law or the DMA**. Under the former, the Commission would open an abuse of dominance case and should build a theory of harm to the requisite legal standard imposed by the EU Courts. Under the latter, the Commission would launch a market investigation and then adopt a delegated act to add the course of conduct under consideration to the list of the DMA obligations. In order to do so, the Commission should prove that such conduct weakens market contestability or creates an imbalance between the rights and the obligations of the gatekeeper and its business users. This standard of intervention will have to be interpreted by the Courts but, on first analysis, it seems to be lower than the legal standards under competition law. This difference in legal standards is not surprising, as the DMA aims to facilitate and speed up intervention compared to competition law, for a subset of firms designated as gatekeepers of core platform services.

However, given such difference in the applicable legal standard, it is reasonable to expect that the Commission will choose between its competition and DMA powers, not only according to the type of gatekeeper conduct at play but also to the function of the ease of intervention. As the DMA standard is lower than the competition standard, we may reasonably expect the Commission to favour market investigation under the DMA over competition law enforcement when intervening against designated gatekeepers. Again, this is not a problem as such, since the regulated platforms have significant market power in their role as gatekeepers. Nonetheless, two important safeguards are necessary to ensure that the Commission does not abuse its extensive concurrent powers and to maintain legal predictability.

To prevent the risk of abuse of power and regulatory creep, the standard of intervention to propose a delegated act expanding the DMA list of obligations should be based on sound economic interpretation of market contestability and B2B fairness. To ensure legal predictability, the Commission should explain in advance the criteria it will use to choose between its regulatory and competition powers.[192] To do that, the Commission may, for instance, rely on the criteria it uses to select markets for ex-ante regulation in telecommunications.[193] Such selection is based on three criteria, and the third one, in particular, indicates that: 'Competition law interventions are likely to be insufficient where for instance the compliance requirements of an intervention to redress persistent market failure(s) are extensive or where frequent and/or timely intervention is indispensable. Thus, ex-ante regulation should be considered an appropriate complement to competition law when competition law alone would not adequately address persistent market failure(s) identified'.[194]

The Commission could also rely on the criteria proposed by Motta and Peitz to determine when a new EU market investigation tool (the so-called New Competition Tool) would be a better route than an Article 102 TFEU enforcement action. This may be the case when a competition law assessment is long, complex and uncertain or when a competition law assessment would not solve a generalized problem, but just deal with one specific conduct or firm.[195] On those bases, possible criteria to favour

[192] In the UK where most of the regulators have concurrent power, they have concluded MoU with the competition authority which clarify how concurrent powers will be exercised. See for instance, Memorandum of understanding of 8 February 2016 between the CMA and Ofcom on concurrent competition powers. Also Crocioni, Ofcom's Record as a Competition Authority: An Assessment of Decisions in Telecoms, EUI Working Paper RSCAS 2019/93.
[193] In telecommunications regulation, the three criteria test placing the frontiers between competition law and regulation is used to select markets for regulation but not the obligations which are imposed on those markets. In the DMA, the criteria should be used to select the obligations to be imposed but not the markets (or Core Platforms Services) on which those obligations will be imposed.
[194] EECC, Article 67(1) clarified by Commission Recommendation 2020/2245 of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to ex-ante regulation, OJ 2020 No. L 439/23, recital 17. Never and Preissl, The three-criteria test and SMP: how to get it right, International Journal of Management and Network Economics, 2008, 100.
[195] M. Motta M and M. Peitz, *Intervention trigger and underlying theories of harm,* Expert Study for the European Commission, October 2020.

a DMA over competition law enforcement could comprise the recurrence or the prevalence a conduct by different types of gatekeepers, or the need to intervene quickly or with remedies that require extensive monitoring.[196]

Adopting such criteria would be useful to ensure legal predictability, but cannot undercut the responsibility of the Commission to apply EU competition law. Indeed, competition law – which is primary law – cannot legally be sacrificed on the altar of the DMA – which is secondary law. More fundamentally, given that the initial list of obligations and prohibitions found in the DMA appears largely based on experience in competition law enforcement, it may seem appropriate to continue to use competition law as the first line of intervention, in order to build up experience and "test-drive" theories of harm in actual cases before courses of conduct are enshrined in the DMA list of prohibitions and obligations.

5.2 Relationship with national competition law

While the DMA proposal prohibits the Member States from imposing further obligations on designated gatekeepers to ensure contestable and fair markets, it does not impede Member States to impose obligations on the basis of EU or national competition rules.[197] Specifically, any obligation imposed on designated gatekeepers under national competition law is allowed provided this is compatible with Regulation 1/2003.[198] For instance, the **parallel imposition of obligations under the DMA and under the newly adopted Section 19a of German Competition Law[199] which targets similar platforms is possible.** In case of parallel applications of both the DMA and competition law, the Court of Justice of the EU has already judged that there is only a very limited regulated conduct defence which is merely applicable when compliance with regulation forces the regulated firms to violate competition law.[200] EU Institutions have also adopted a very narrow understanding of the *ne bis in idem* principle which allows the same corporate conduct to be condemned under two different regulatory instruments, such as the DMA and competition law, if they protect different legal interests.[201]

Such parallel imposition, at best, undermines the internal market and, at worst, leads to inconsistency. In order to avoid such pitfalls, good coordination between the Commission as a DMA enforcer and the NCAs is essential. However, there is no obvious existing forum where such coordination should take place. In particular, the ECN and the coordination mechanisms of Regulation 1/2003 are not appropriate because the DMA is not a competition law tool. Thus, a **new permanent cooperation forum where the Commission and the NCAs (possibly with other independent national authorities) meet to discuss the enforcement of the DMA could be established**. Such forum would reduce the risk of divergent or incompatible decisions adopted by the Commission under the DMA and by an NCA under competition law. Such forum would also, as explained earlier in Section 3, allow the NCAs to bring their expertise and legitimacy in support of the enforcement of DMA.

While the establishment of a cooperation forum between the Commission and the NCAs may reduce the risks of divergent or incompatible decisions, it may not alleviate it completely. Therefore, a conflict rule needs to be in place. In that regard, a narrow rule based on the concrete actions of the respective authorities is preferable to an absolute hierarchical rule based on "fields" or

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[196] Those criteria may also be inspired by the reasons mentioned by the Commission services for the insufficiency of competition law in dealing with some structural competition problems in the digital economy: Impact Assessment Report on the DMA Proposal (fn.138), at paras. 119-124.
[197] DMA Proposal, art.1.6.
[198] Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. [2003] L 1/1, as amended, art.3(2) provides that: "(…) Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings".
[199] See Section 19a of German Competition Law on Abusive Conduct of Undertakings of Paramount Significance for Competition across Markets. An non official English translation is available at: https://www.d-kart.de/wp-content/uploads/2021/01/GWB-2021-01-14-engl.pdf
[200] Case C-280/08P *Deutsche Telekom*, EU:C:2010:603.
[201] COMP/39.525, *Telekomunikacja Polska*, paras 143-145. This is confirmed by Prop. DMA, rec.10.

"competences".[202] On that basis, **both competition law and the DMA could apply concurrently, unless their concurrent application puts the regulated gatekeeper in a situation where it cannot comply with both regimes at the same time**. Such cases should be exceptional. There would thus be no conflict if, under one regime, the gatekeeper platform is put under a regulatory obligation, whereas under the other regime, analysis led the platform not to be subjected to any obligation. In such a situation, the platform can comply with both regimes. To the extent that the two regimes are complementary, there should not be any significant proportionality issue, since the respective interventions of each authority are presumably necessary and proportionate to the aims of the respective regimes. Under such a narrow conflict rule, the emphasis would be on institutional mechanisms for the Commission and the NCA to cooperate and coordinate their actions so as to avoid a situation where the regulated platform is put in an impossible bind.

In spite of the point outlined above, should a firm find itself in a position where it cannot comply with one regime without breaching the other, then we would suggest the following conflict rule. Our starting point is the preservation of the single market (which is the objective of the DMA) while respecting the hierarchy of law (i.e., EU competition law – but not national competition law going further than EU law- prevails over the DMA). Therefore, **in case of an incompatibility between an obligation imposed by the Commission under the DMA which apply across the EU and a remedy imposed by an NCA under national competition law going further then EU law which apply only to one Member State, the DMA obligation should prevail**. Alternatively, it may be claimed that under the principle of sincere cooperation of Article 4 TEU, a Member State cannot impose an obligation which undermines EU law. Thus, should a national competition authority impose to a designated gatekeeper an obligation which contradicts the DMA, the gatekeeper could refuse to implement such obligation by claiming that the Member State imposing such obligation violates EU law.[203]

[202] As explained by P. Larouche and A. de Streel, *Interplay between the New Competition Tool and Sector-Specific Regulation in the EU*, Expert Study for the European Commission, October 2020.
[203] Case C-198/01 *Consorzio Industrie Fiammiferi (CIF)*, EU:C:2003:430

RECOMMENDATIONS MAKING THE DIGITAL MARKETS ACT MORE RESILIENT AND EFFECTIVE

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These recommendations have been prepared by a group of CERRE academics[204] on the basis of a series of four issue papers prepared by the group, which are annexed to this report, as well as four internal workshops in which CERRE members participated.[205] The recommendations aim to contribute to the current legislative negotiations between the European Parliament and the Council and to improve the European Commission's proposal for a Digital Markets Act in order to make the new rules more resilient and effective.[206]

After an explanatory statement which develops the main rationale of our recommendations, the next section provides the list of the recommendations with a short justification and follows the order of the Articles of the Commission proposal.

1 Explanatory statement

Our recommendations aim to improve the Commission's proposal **in five main dimensions**. The first dimension is to **clarify the objectives that the DMA aims to achieve and, in doing so, the logic behind the prohibitions and obligations**. While the Commission proposal refers to three objectives (contestability, fairness and internal market), the meaning of contestability and fairness is not fully clear and the relationships between the objectives and the obligations are not always obvious. Moreover, the underlying logic and theories of harms (to contestability or fairness) behind the list of the 18 obligations in Articles 5 and 6 is not obvious. Our first recommendation (on Article 1) aims to clarify the meaning of contestability and fairness to increase legal certainty and to facilitate the enforcement of the DMA, thereby contributing to its effectiveness.

The second dimension is to ensure that the **scope of the DMA minimises the risks of under-inclusiveness and over-inclusiveness**. The first type of risk may be costly because the conduct of some digital platforms which are detrimental to contestability or fairness could not be effectively policed by the DMA. The second type of risk may also be costly as the limited enforcement capabilities should be concentrated on platforms' practices which are the most determinantal to contestability and fairness. Moreover, there is a link between the scope of the DMA and the obligations that may be imposed. Our recommendations (on Articles 2 and 3) aim to find a good balance between the two risks.

The third dimension is to ensure a **good balance between the administrability and the flexibility of the DMA**. On the one hand, in these markets, where gatekeeper positions are already entrenched and risk being extended further, there are serious risks associated with inaction, and a need for rapid intervention. This in turn requires rules which are not too open-ended, so that they are straightforward both for firms to comply with and for the regulator to enforce. On the other hand, digital markets are complex, full of trade-offs, rapidly changing and contain a wide variety of digital platforms with different business models and characteristics. Therefore, rules cannot be 'quick and dirty' with an excessively high risk of type 1 (over-enforcement) and type 2 (under-enforcement) errors. There is thus a difficult balance to be found. Overall, while we think that maintaining compliance and, if necessary, rapid enforcement is essential, our recommendations (on Articles 6a, 6b, 7 and 9a) aim to maintain the straightforward rules proposed by the Commission but to complement them by moving the cursor a little towards increasing flexibility, thereby reducing error risks and recognising individual circumstances.

The fourth dimension is to include more explicit **mechanisms and processes in the DMA with which the authorities enforcing the DMA can learn from experience and improve**

[204] This academic team was coordinated by Alexandre de Streel and composed of Richard Feasey, Jan Kramer and Giorgio Monti. We also greatly benefit from the very useful comments of Amelia Fletcher.
[205] See the previous CERRE contributions on the DMA at: https://cerre.eu/publications/the-european-proposal-for-a-digital-markets-act-a-first-assessment/ and https://cerre.eu/publications/digital-markets-act-economic-regulation-platforms-digital-age/
[206] Proposal of the Commission of 15 December 2020 for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842; also Impact Assessment Report of the Commission Services on the Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), SWD(2020) 363.

regulation over time. In every sector the economy, regulation needs to improve over time, but this is particularly the case for the DMA. Given the novelty and the complexity of the business models and the competitive dynamics of the digital economy, the current design of the rules is bound to be imperfect and enforcers are bound to make mistakes, even though it would be a bigger mistake not to do anything. While errors in the design and the enforcement of the rules are inevitable, it is of the utmost importance that the DMA contains internal mechanisms to help improve rules and enforcement over time as more is known through research and enforcement. Our recommendations (in particular on Articles 6b, 7 and 38) aim to make those mechanisms more explicit.

Finally, the fifth dimension is to ensure a **good institutional design and allocate regulatory tasks according to the comparative advantages in terms of competence and capacity of each EU or national institution**. As foreseen in the Commission proposal, there is an undeniable merit in centralising enforcement at the EU level to avoid divergence and to ensure effective European wide enforcement of the DMA. However, national authorities have some advantages: knowledge of local conditions and proximity to businesses or expertise in designing remedies. Our recommendations (on Articles 18, 33, 33a, 33b) aim to increase the role of national independent authorities and judges in supporting the Commission in centrally enforcing the DMA.

2 Recommendations for improvements

2.1 Chapter I: Subject matter, scope and definitions[207]

2.1.1 New Article 1a: Objectives

The current Article 1(1) should be developed as a stand-alone article clarifying the three objectives of the DMA: contestability, fairness and internal market. The objective of **contestability** should not be limited to contestability on the Core Platform Services (CPS) but should extend to related services and markets. Therefore, contestability should be widened to include both platform disintermediation and limiting unfair leverage by gatekeepers into related markets. Alternatively, if the contestability objective is not widened, the DMA should be more explicit about how leverage is addressed by the fairness objective.

> *Justification: The Commission proposal seems to relate to the contestability of regulated Core Platform Services (CPS) only. This is a narrow approach which seems to exclude two important forms of contestability. First, it is not clear whether contestability encompasses platform disintermediation which is an issue when users lack choice. This can take two forms: either business-users moving to direct supply; or partial disintermediation, whereby business-users utilise an alternative provider for some – but not all - parts of the CPS service. Platform disintermediation may not lead to the entry or expansion of a full-service rival to the gatekeeper but can provide an important competitive constraint on it. Hence, we suggest that platform disintermediation should be recognised as an element of contestability.*
>
> *Second, it is not clear whether contestability of related markets - and therefore unfair leverage by a gatekeeper from the regulated CPS into related markets – is covered. In this context, we note that two key problems with digital platform markets have been identified: first, they tend to tip, being highly concentrated and hard to contest frontally; secondly, the incumbent platforms may leverage unfairly their position into related markets. The contestability objective in the Commission proposal encompasses the former concern, but not the latter (at least directly). However, as competition in the digital economy often comes from adjacent markets, it is important that those adjacent markets remain open and contestable.*

The objective of **fairness** should be clarified by focusing on commercial opportunity and reformulated (from the proposed art.10.2a) in the following manner: "an imbalance of rights and obligations on business-users, which effectively restricts the commercial opportunity open to the

[207] On this matter, see the first Issue Paper on gatekeeper definition and designation.

business-user, and so confers an advantage on the gatekeeper that is disproportionate to the service provided by the gatekeeper to business-users." If so, it could also be clarified that commercial opportunity relates to (i) fair right of access to alternative routes to market, (ii) equitable treatment of third-party business-users relative to the gatekeeper's rival services, (iii) fair transparency about services provided and the terms of those services and (iv) fair rights of expression to public authorities.

> *Justification: The concept of fairness in the DMA should be clarified to increase legal certainty for the designated gatekeepers and their users, as well as to facilitate enforcement by the Commission and the judiciary. This is especially important given the expectation of self-execution of the DMA. It seems that the DMA fairness concept excludes both fairness to end-users and the fair sharing of surplus between commercial firms. These may well be indirect benefits of the DMA, but they do not appear to be direct objectives. This could usefully be made more explicit.*

2.1.2 Article 2: Definition of Core Platform Services

Number-independent interpersonal communication services and cloud computing services should be treated in the same manner as advertising services. They should be considered as **"accessory" CPS** and be regulated only when they are provided by a digital platform that also offers another "primary" CPS.[208]

> *Justification: Core Platforms Services are two-sided while communications services and some cloud services are inherently single-sided. It is far from clear how the wording in Article 3.1.b applies to these services, since they typically act as gateways between end-users or between business-users but not between one group and another. In addition, communications services and cloud services are the CPSs that are subject to the lowest number of obligations currently foreseen in Articles 5 and 6.[209]*

2.2 Chapter II: Gatekeepers[210]

2.2.1 Article 3: Designation of gatekeepers

Concerning the **criteria to designate a gatekeeper**, the wording in Article 3(1b), 'service which serves as' should be changed to 'service or services which serve, individually or jointly, as'.

> *Justification: Some CPS are effectively one-sided networks in themselves but form part of an overall gateway between business users and end-users. For example, it might be said that the CPS of social networks primarily has end-users, while the associated services provide the business users.*
>
> Moreover, a fourth criteria for gatekeeper designation should be provided in Article 3(1). To be designated as gatekeeper, a **digital platform should control at least two primary or accessory CPS**s and not merely one as currently proposed by the Commission. [211]
>
> *Justification: This additional condition, which was envisaged by the Commission in preparing the DMA proposal,[212] has the advantage of focusing this first-generation DMA (and the*

[208] In later reviews of the DMA, the scope might be expanded to include other CPS, or to move 'ancillary' CPS to 'primary' status.
[209] Moreover, those two CPS are already subject to existing EU law that may address some of the concerns of the Commission. Number-independent interpersonal communication services are covered by the EECC and subject to transparency and interoperability obligations: Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, OJ [2018] L 321/36. Cloud services are covered by the Free Flow of Data Regulation which encourages codes of conducts to facilitate the porting of data and the switching between cloud providers: Regulation 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union, OJ [2018] L 303/59, art.6.
[210] On this matter, see the first Issue Paper on gatekeeper definition and designation.
[211] In later reviews of the DMA, the scope might be expanded to gatekeeper providing on CPS only.
[212] Impact Assessment, para.148 and 388.

limited enforcement resources) on the most pressing problems in the digital economy and which have their roots in entrenched control of ecosystems.

The application of the **size presumptive threshold** in Article 3.2 to accessory CPS should relate to the number of business users *or* the number of end users and not, as foreseen in the proposal, to both business and end users.[213]

Justification: As the user threshold relates to end-users and business users, it may be difficult to apply each threshold in isolation to an accessory CPS which is inherently single-sided and not a gateway between end-users and business-users.

The **indicators in Article 3(6)** which can be used to rebut the gatekeeper presumption should explicitly include the presence of effective and meaningful multi-homing for business users and end-users. Moreover, the Commission should adopt guidelines on the manner it will use and assess those indicators.

Justification: Multi-homing is one of the key criteria to determine gatekeeper power and therefore should be included in an Article of the DMA and not merely in a Recital.[214] *Moreover, as the gatekeeper concept is new in EU law and the list of indicators proposed in the DMA remains open, the Commission should enhance legal predictability by adopting guidelines on the manner it will use and assess those indicators. Those guidelines are often adopted in competition law and in some economic regulation.*

The Commission designation decision should **list the commercial services** which are covered by a specific CPS to which the gatekeeper designation applies and which are to be subject to the obligations and prohibitions of the DMA.[215]

Justification: One specific legal CPS may cover several commercial digital services. To ensure legal certainty and proportionality, the Commission should list, in its designation decision, which commercial services will be subject to the DMA prohibitions and obligations. The selection of commercial services should be done on the basis of the user size threshold of Article 3(2b), ensuring that only CPS services which meet or exceed these thresholds will be subject to obligations.

2.2.2 Article 4: Review of the status of gatekeepers

The **review of the gatekeeper designation** should be undertaken every 5 years rather than every 2 years. However, firms designated as gatekeepers could request that the Commission undertake an ad hoc review at any time during this period, but the Commission would be under no obligation to accede to such a request.

Justification: A review cycle of two years for gatekeeper designation is very short given the logistical and fact-finding pressures it imposes upon the Commission and the fact the timeline for potential competition assessment in antitrust is generally three years. The cycle should be longer, for instance, five years as it is provided for in the EU telecommunications regulation[216]

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[213] Moreover, concerning Article 3.7, the criterion for designating an accessory CPS should be slightly different. It should not be Article 3.1.b alone, but rather whether the accessory CPS *either* satisfies Art 3.1.b *or* serves as an important gateway between end users or between business users.

[214] In the Commission proposal, multi-homing in only mentioned in recital 25.

[215] Alternatively, obligations apply to all of the services provided by a gatekeeper within a regulated CPS, whether or not they would also justify regulation in their own right, but it should then be possible for the Commission to narrow the scope further through the Article 7 specification process where the specification decision could exclude some commercial services from the obligations, again on the basis of the user size threshold of Article 3(2b). This seems especially justified where services might not be seen as gateway service in their own right but would in combination with another service within the same CPS category (e.g., Instagram).

[216] EECC, art.67(5).

or as it has been proposed in the CMA Advice to balance sufficient time for the effect of regulation to be observed, with the need to ensure the designation remains appropriate.

2.3 Chapter III: Practices of gatekeepers that limit contestability or are unfair[217]

2.3.1 Articles 5: Obligations for gatekeepers

In relation to the **anti-steering prohibition** (art.5.c), it is not currently clear whether the prohibition (art.5.c) applies only to online intermediation services or to other CPSs or how it would apply to another CPS if so. It is also not clear whether the second part of the obligation (to allow users to access items through the platform, even if bought through an alternative route) is limited to items that are also available via the platform, and if not, whether the platform would be expected to invest in any functionality that may be required to enable this.

Justification: Some Article 5 obligations need to be clarified or fine-tuned, especially given that these are intended to be broadly self-executing.

In relation to the **prohibition of MFNs** (art.5.b), we note that this currently covers online intermediation services only. Its applicability could usefully be extended to other CPSs, not least because the first part of this obligation effectively limits exclusive dealing as well as broad MFNs. Also, given the entrenched market position of the gatekeepers, consideration should be given to widening this art.5.b obligation to prohibit narrow as well as broad MFNs.

Justification: Wide MFNs are effectively prohibited under competition law, so it seems strange to limit the scope of that aspect of this obligation. The exclusive dealing element (the first part of the obligation) would also be useful more widely; while exclusive dealing can have pro-competitive benefits, it is highly likely to be unfair and to contribute to a lack of contestability when imposed by a large gatekeeper platform with an entrenched market position. The same is true for narrow MFNs; they can have efficiency benefits but are highly likely – on balance – to harm fairness and contestability for those firms subject to the DMA.

2.3.2 Article 6: Obligations for gatekeepers susceptible to being further specified

Several Article 6 obligations merit **greater upfront clarification**, within the Recitals, or even reformulation. There are certain obligations where the wording is simply unclear, or where greater specification would be helpful. For example:

- Does the **self-preferencing** prohibition (art.6.1d) relate to ranking 'services and products' (i.e. ranking services and ranking products) or ranking services and (any sort of) products?

- For **end user data portability** (art.6.1h), it would be useful to make explicit that the requirement for 'effective' data portability implies a requirement that data should be directly portable, with the end user's consent, to a third party business via an open API (as opposed to having to be downloaded by the end user and reuploaded), and also that end users should have ready access to an appropriate system for viewing and revising their consents.

- For **business user data access** (art.6.1i), the obligation requires the provision of aggregated or non-aggregated data, but it is not clear who decides which.

There are other areas where the scope is ambiguous, in terms of which CPSs are expected to be covered, and arguably extend beyond the particular CPS raising the concerns which motivate the obligation, and therefore could provoke undesirable side-effects. Some of these should be **narrowed**, not least because they do not necessarily make sense in relation to every CPS potentially

[217] On this matter, see the second Issue Paper on DMA architecture and the third Issue Paper on obligations and prohibitions.

covered. Examples could include Art 6.1a (on use of data related to business users), 6.1d (on self-preferencing in ranking), 6.1e (on device neutrality) and 6.1f (on user data portability).[218]

Other obligations may be **broadened** either directly in Article 6 or through the adoption of a new article with more generally defined prohibitions of certain types of conduct that limit contestability and fairness (see below, proposed new Article 6b).

> *Justification: Such modifications aim to ensure a better balance between administrability, legal certainty, and proportionality, as explained in the third issue paper on obligations and prohibitions.*

Finally, more **security and integrity** safeguards should be provided for in specific obligations, particularly in relation to technical restrictions on switching/multi-homing (art. 6.1e) and ancillary service interoperability (art.6.1f). Where integrity safeguards are included, they should be widened to protect against all types of malware, irrespective of whether it 'endangers the integrity of the hardware or operating system'. At the same time, it should be made clear that the gatekeeper has a responsibility to address security and integrity issues, and that it bears the burden of showing that application of the safeguard is justified, necessary and proportionate.[219]

> *Justification: The imposition of Article 6 obligations must not reduce adversely platforms' security and integrity to the detriment of end-users. Therefore, the safeguard clause which is provided for app installing (art. 6.1.b) and side loading (art. 6.1.c) should be extended to other obligations. Given the importance the DMA places on guaranteeing user safety, the interplay between these obligations and the ability of platform operators to protect users against illegal content and fraud should also be taken into consideration.*

2.3.3 New Article 6a: Access obligations that always need to be specified

A new Article 6a subject to a particular specification process should be added with some of the obligations currently in Article 6. They relate to **interoperability obligations** (art.6.1c and art.6.1f) as well as **data access and portability** (art.6.1j, art.6.1i and 6.1h).[220] In addition, those access obligations should be applied on a gatekeeper by gatekeeper basis, rather than being universally applicable as in Articles 5 and 6. In particular, there should be potential for the Commission to narrow the application of these obligations to specific CPSs and specific use cases where interoperability and data portability would genuinely increase contestability.

> *Justification: We propose to develop further the clustering of the obligations according to the specification mode which has already been initiated in the Commission proposal. Therefore, we recommend moving to a new separate Article the obligations currently in Article 6 which aim at supporting entry and at pro-actively supporting competition.[221] Those obligations are different in nature from the other Article 6 obligations, are potentially very wide-reaching and if applied extensively, may impose substantial costs and bring limited benefit. They have to be targeted to where they are most needed. Therefore, unlike Article 6 obligations, those obligations will need to be specified in all cases before being enforceable and such a specification process may take longer than the six months proposed for other obligations. It will also be crucial that the specification process (as described below in Article 7) should be effective and rapid in order not to undermine the effectiveness of Article 6a obligations which are key to ensuring contestability and fairness.*

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[218] If the proposal below in relation to a new Article 6a is not taken forward, consideration should also be given to narrowing the scope of 6.1f, 6.1h and 6.1i.
[219] In that regard, we note that messages for users highlighting security and integrity risks may be more proportionate than an outright ban (e.g. on side-loading). Any such messages would in turn need to be proportionate to the risks; otherwise, they would likely constitute circumvention under art.11.
[220] Moreover, for the search data access obligation (art 6.1j), it would be useful to clarify that the requirement covers *all* query, click and view data, and not just a subset thereof.
[221] Those types of obligations are named 'pro-competitive interventions' or PCIs in the CMA's Advice.

2.3.4 New Article 6b (replacing Article 10): Generic prohibitions that always need to be specified

Next to a new Article 6a focused on *access obligations*, another new Article 6b should be inserted in the DMA that will be focused on **more generally defined *prohibitions.*** This Article would 'generalise' some of the main conduct targeted by Articles 5 and 6. Thus, it could prohibit conduct having the object or the effect of preventing business users or end users from switching or multi-homing. It could also prohibit conduct aimed at the unfair envelopment of new markets, to the disadvantage of existing or potential competitors, through bundling and self-preferencing. In particular, this would broaden the prohibition of tying between two CPSs for which a gatekeeper designation has been made (art.5.f) and apply it to unfair leverage beyond regulated CPS markets. Alternatively, this new Article could prohibit the conduct which limits the commercial opportunity of business users, by reducing (i) fair right of access to alternative routes to market, (ii) equitable treatment of third-party business users relative to the gatekeeper's rival services, and (iii) fair transparency about services provided and the terms of those services.

The prohibition being defined in more general terms should correlate to the gatekeeper having **more possibilities at their disposal to bring a contestability and fairness defence when it comes to the obligations foreseen in Article 6b**, than the gatekeeper would have under the detailed obligations in Articles 5 and 6[222]. Also as the prohibitions are more general, the scope of the obligations and the measures to be taken will need to be specified by the Commission before being enforceable against individual gatekeepers. As for Article 6a, those general prohibitions should be applied on a gatekeeper by gatekeeper basis, rather than being universally applicable.

> *Justification: The current proposed Article 10 could be interpreted narrowly because the prohibited conducts are an essential element of the DMA that cannot be changed with a Commission delegated act. In this case, it limits the Commission's ability to add new obligations to conduct already foreseen in Articles 5 and 6. With such a narrow interpretation, Article 10 could be redundant with the anti-circumvention clause of Article 11. Alternatively, Article 10 could be interpreted more broadly. In this case, it allows the Commission to add new obligations which contribute to contestability and fairness. With such a broad interpretation, Article 10 gives very large discretion to the Commission. At this stage, it is not clear which interpretation will prevail. Our proposed new Article 6b constitutes a middle ground between those two interpretations or, in other words, between (too) narrow and (too) broad Commission discretion. To do so, we propose to "generalise" some prohibitions already foreseen in Articles 5 and 6. Thereby, it will enable the Commission to specify additional measures, beyond those required to comply with Articles 5 and 6, as new forms of problematic conduct emerge following the implementation of the DMA. Such a specification process could be done under Article 6a or with a market investigation procedure as the Commission had envisaged for Article 10.*

2.3.5 Article 7: Specification decision

The Article 7 process under which a gatekeeper can request a specification decision (or the Commission issue one at its initiative) should apply to obligations in Articles 5, 6, 6a and 6b. The Commission would only be expected to issue a specification decision in relation to Article 5 obligations in very exceptional circumstances. It would enjoy broad discretion in deciding to specify Article 6 obligations and it would always be required to specify Article 6a obligations or Article 6b prohibitions.

[222] See Article 9a below.

The **specification process** should be the following:

- A request for a specification decision could be made by a gatekeeper within [3] months of its designation and should include details of the proportionate measures which the gatekeeper proposes to take and which it considers would ensure effective compliance with the relevant obligation.

- The Commission should respond to a request for a specification decision within [14] days of receipt, confirming whether or not the Commission will initiate a proceeding. A decision by the Commission to decline a request for a specification decision should not be capable of being appealed.

- The Commission should be required to issue the specification decision with proportionate measures within 6 months of opening a proceeding for all obligations except those in Articles 6a for which the specification process can be longer given its complexity. In doing so, the Commission may accept commitments from the gatekeepers in its specification decision.

- Within the timeframe foreseen for its specification decision, the Commission should consult with gatekeepers but also with third parties as well as national independent authorities on its preliminary findings regarding the design of the measures it deems effective and proportionate to achieve the obligations.

- If the Commission declines a request for a specification decision from a recently designated gatekeeper, the gatekeeper will be expected to comply within 6 months of being designated. If the Commission issues a specification decision, it should specify the date by which any measures in the specification decision must be implemented.

- The Commission should publish a non-confidential version of the specification decision within [14] days of it being issued.

This specification process needs to consider **consumer biases** generally, and more specifically ensure that the choice architecture put in place by the gatekeepers are designed in the users' interest. One option would be to require the gatekeepers to design their choice architecture so that it best reflects the decisions that consumers would make if making fully deliberative choices based on complete information. To do so, the Commission should be able to require, when proportionate, gatekeepers to engage in such A/B testing and to provide the results of any such testing to the Commission, including in support of commitments. Therefore, the specification process will require behavioural economic expertise.

Also, the Commission should publish a **report** after 3 years - and every 3 years thereafter - summarising the specification decisions it has made and any wider guidance which it considers gatekeepers should derive from them, such as how specific measures relate to specific objectives of contestability, fairness and internal market.

> *Justification: Such a process aims to ensure a better balance between administrability, legal certainty, and proportionality than the Commission proposal. To ensure administrability, the Commission keeps its discretion to adopt a specification decision (except for art.6a obligations and art.6b prohibitions). To ensure legal certainty and proportionality, the designated gatekeepers of a CPS have a clearer right to request specification. If the Commission does not issue a specification decision and then opens a proceeding for non-compliance, the Commission should be expected to accept commitments when offered by the gatekeeper and when they are effective in complying with the DMA obligations and the Commission should be expected not to impose a fine.*

If, as we proposed under Article 4, the designation process happens every 5 years (instead of 2 years), the Commission should have the **possibility to re-specify the obligations** when, within

this 5-year interval, measures appear not to be effective or proportionate in achieving the goals of the obligations.

> *Justification: This process allows the Commission to learn from their enforcement experience and improve measures over time as well as adapt them to technology and market evolution.*

2.3.6 New Article 9a: Exemption decision[223]

Gatekeepers should be able to request an **'exemption decision'** from the Commission in relation to any obligation under Article 6 if:

- The obligation is not applicable to the Core Platform Service for which the applicant has been designated as a gatekeeper (e.g. art.6.k is inapplicable because the gatekeeper does not provide a software application store).

- The obligation is potentially applicable, but the particular circumstances of the gatekeeper or the CPS mean that adherence to it would severely undermine contestability or fairness rather than contribute to their achievement.

Moreover, a request for an 'exemption decision' from the Commission in relation to any obligation under Articles 5 or 6 should also be possible if the cumulative effects of the application of all the obligations foreseen in Articles 5, 6, 6a and 6b to a specific gatekeeper make the imposition of such an obligation unnecessary or disproportionate for achieving the objectives of contestability or fairness.

An application for an exemption decision would be subject to the **same process as for specification** decisions taken under Article 7.

> *Justification: The exemption option would broaden the possibilities of not applying DMA obligations currently foreseen by Articles 8 and 9 (suspension and exemption). This is necessary given the numerous obligations foreseen and the diversity of business models to which those obligations apply. However, exemption decisions should be limited, on the one hand, to gatekeepers' conduct which does not impede contestability and fairness and, on the other hand, to DMA obligations which would not be effective and proportionate in achieving contestability and fairness. Hence, this exemption possibility does not introduce in the DMA an efficiency defence as applied in competition law.*

2.3.7 Article 11: Anti-circumvention

Article 11 currently relates to the circumvention of the obligations. Depending on precisely how the scope of the CPS to be regulated is defined, there may also be merit in addressing **circumvention of designation** under Article 3.

Moreover, the recitals linked to Article 11 could include wording that makes explicit that firms may not seek to replace proscribed contractual clauses by other practices.

> *Justification: The circumvention clause needs to be improved. For example, it should not be possible to circumvent the ban on MFN clauses with the possibility to offer higher rankings to suppliers that do not charge lower prices on their own website.*

[223] Alternatively, Article 7 could itself be expanded to ensure that a specification decision could include a decision to exempt a gatekeeper from having to comply with the obligation on the two sets of grounds suggested above. These would sit alongside the requirement of Article 7(5) that any measures must be proportionate.

2.4 Chapter IV: Market investigation

2.4.1 Article 16: Systematic non-compliance

No commitments should be available in Article 16 procedures, hence the reference to commitments in Article 16(6) should be deleted.[224]

> *Justification: See justification under Article 23.*

2.5 Chapter V: Investigation, enforcement and monitoring powers[225]

2.5.1 New Article 18a: Complaint mechanism

A **formal procedure** should be established by which business users, end users or competitors[226] can make **complaints** to the Commission or the national independent authority when they consider that a gatekeeper has infringed its obligations under the DMA. Moreover, the Commission or national authority receiving the complaint should offer a well-designed whistleblowing function, whereby complaints can be made in a way that protects the complainant's anonymity.[227]

> *Justification: There is no procedure for complaints in the Commission proposal and this limits the Commission's capacity to secure information about how the obligations are applied in practice and how businesses are affected, as well as identifying other forms of conduct which may be addressed under our proposed new Article 6b. Our recommendation can also facilitate setting enforcement priorities for the Commission. Moreover, while the obligation not to prohibit firms from raising issues with public authorities (in art.5.d) is welcome, it is unlikely to be fully effective until the Commission can offer a well-designed whistleblowing function.*

2.5.2 Article 23: Commitments

The designated gatekeepers should be allowed to offer **commitments** already during the Article 7 specification procedures. Moreover, the Commission should take account of whether or not an Article 7 specification decision has been issued in relation to a particular obligation and gatekeeper when considering whether or not to accept commitments under Article 23 during a non-compliance proceeding.

> *Justification: The DMA appears to be based on a model of responsive regulation by which the starting point is an assumption that parties wish to comply and the role of the Commission should be to indicate a compliance path (the regulatory dialogue). Non-compliance with the obligations leads to increasingly punitive measures as well as to the unilateral imposition of remedies, however, the Commission proposal provides too many options for designated gatekeepers to offer commitments when not complying with their obligations. Our recommendation gradually reduces the option of offering commitments as the gravity of the infringement escalates. At the same time, it affords gatekeepers the option of offering commitments early in the process during the Article 7 procedure, in line with the expectations that gatekeepers at this stage wish to comply.*

The Commission should **consult with third parties**, in particular business users, end users and competitors of the designated gatekeepers, before accepting or rejecting commitments.

> *Justification: Third parties are affected by the conduct of gatekeepers and are well-positioned to comment on whether a gatekeeper's proposed course of conduct is likely to*

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[224] Recital 67 contains an error: it should read systematic non-compliance, as this is the term used in Article 16.
[225] On this matter, see the fourth Issue Paper on enforcement and institutional arrangements.
[226] A competitor may be defined in Article 2 in the following manner: 'Competitor to the gatekeeper's core platform service' means any natural or legal person acting in a commercial or professional capacity providing a core platform service in the same category as the one of the gatekeepers).
[227] Also, it would be useful to make explicit that the anti-circumvention element of the DMA (Article 11) implies that gatekeepers are prohibited from any retaliation against complainants or whistle-blowers, even if there is no explicit non-complaint clause in their contract.

achieve the aims of the DMA. The market test procedure found in antitrust commitment decisions seems like a model to be followed.[228] It can be set out in a soft law Notice, but reference to a third-party role should be included in the DMA.

2.5.3 Article 24: Monitoring of obligations and measures

The Commission should be able to **rely on information - even confidential information - collected under other investigations**, in particular under competition law or Digital Services Act (DSA) enforcement, to monitor the compliance of the DMA obligations and measures. Moreover, the Commission should be able to share confidential data with vetted researchers while respecting EU rules on confidentiality and trade secrets.[229]

Justification: The Commission will have multiple enforcement powers against the same digital platforms under different EU legal rules (in particular, competition law, DMA and DSA). It is key that the Commission is able to maximise the synergies between those different powers while guaranteeing the fundamental rights of the digital platforms. Therefore, a specific legal basis allowing the exchange of confidential information across enforcement powers is necessary. It is also important that the Commission is able to rely on the support of vetted independent experts to analyse the databases and the algorithms of the designated gatekeepers. For this support to be effective, the researchers should have confidential access to those databases and algorithms.

2.5.4 Article 26: Fines

The Commission should take account of whether or not an **Article 7 specification decision** has been issued in relation to a particular obligation and gatekeeper when considering whether to impose a fine and the level of the fine to be imposed.

Justification: Such a process aims to ensure a better balance between administrability, legal certainty, and proportionality than the Commission proposal. If the Commission did not issue a specification decision, the Commission should be expected to accept effective commitments when offered by the gatekeeper and not to impose a fine.

2.5.5 New Article 31a: Alternative dispute resolution

The DMA should establish an **external alternative dispute resolution** mechanism between the designated gatekeepers and their users under the responsibility of a national independent authority. The national authority can refer the disagreement to the Commission to consider enforcement proceedings.

Justification: Mediation is already provided in the P2B Regulation[230] but is applicable to all big and small platforms covered by the P2B Regulation and it may not be effective enough when applied to the gatekeepers designated under the DMA. Alternative dispute resolution mechanisms have proved to be useful and effective in other EU regulatory frameworks such as the one applicable to electronic communications.[231]

2.5.6 Article 33: Role of national independent authorities

The **role of national independent authorities should be augmented** in the following ways: (i) as an institution to which complaints may be made (new Article 18a) and (ii) as an institution responsible for facilitating alternative dispute resolution (new Article 31a). Moreover, an EU network of independent authorities (as per new art.33a) could play a bigger advisory role during the specification procedure (Article 7) and market investigations (Articles 14-17).

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[228] DG Competition, Antitrust Manual of Procedures (2012) ch.16.
[229] As foreseen in art. 31 of the DSA Proposal.
[230] P2B Regulation, art.12.
[231] EECC, arts.25-26

It should be left to the Member State to designate which national authorities should have those roles provided they meet minimum requirements which should be defined in the DMA, in particular regarding competence, resources and independence. Thus, it may be existing authorities (such as a competition agency, telecom regulator, privacy regulator, cyber-security agency …) or new ones. Different authorities may be involved in different issues.

> *Justification: There is merit in centralising enforcement in the Commission to avoid divergence and to ensure effective EU-wide enforcement of the DMA. However, national independent authorities have some advantages: knowledge of local conditions and proximity to businesses suggests that they would be well-placed to receive concerns and facilitate alternative dispute resolution. The expertise that some national authorities have gained in digital markets can be used by the Commission in designing remedies. For instance, the Commission should liaise with the system of data protection regulation given that several DMA obligations are likely to be significant issues of GDPR interpretation.*

2.5.7 New Article 33a: EU-network of independent national authorities

The DMA should establish, next to the Digital Markets Advisory Committee (DMAC) foreseen in Article 32, an **EU network of independent national authorities**. It would then be up to each Member State to decide which (existing or new) national authorities should be part of such a network.

> *Justification: It is key that the national authorities supporting the Commission are independent of political power. While such independence is expected by the Commission, it is by no means guaranteed by its proposal because the DMAC is a comitology committee whose members should be representatives from the Member States, but not necessarily from their independent authorities.[232] In practice, national representatives in comitology committees often come from Ministries. To deal with such an issue, several EU sector-specific regulations provide for two different networks of national authorities, one comitology committee and another one composed of independent authorities.[233]*

2.5.8 New Article 33b: Private enforcement

The DMA should include **more clarification on private enforcement**. It may require the Member States to ensure 'adequate and effective enforcement and ensure that courts can provide remedies that are 'effective, proportionate and dissuasive.'[234] The same provision should prevent national courts from issuing decisions incompatible with actual or contemplated decisions of the Commission.[235]

In parallel, some more **precise safeguards** should be included in the DMA. First, national judges should have no ability to assume designation for a platform that the Commission had not designated. Second, for the obligations that need to be specified by the Commission, private enforcement actions should only be possible after a Commission specification decision has been issued. This is particularly important for our newly proposed Article 6a on access obligations and Article 6b on general prohibitions.

> *Justification: While the involvement of national judges is inevitable if a business wishes to complain, there is also a risk that private enforcement undermines the flexibility of the*

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[232] Regulation 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers OJ [2011] L 55/13, art.2.
[233] For instance, in telecommunications: EECC, art.118 establishing the Communications Committee (CoCom) which is a comitology committee and Regulation 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of the European Regulators for Electronic Communications, OJ [2018] L 321/1.
[234] P2B Regulation, Article 15.
[235] Alternatively, revise Article 1(7) to include national courts. For reference, this is the language in Article 16 of Regulation 1/2003: "they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty."

Commission in relation to the Article 7 specification process. Several safeguards need to be created: (i) building on the duty of sincere cooperation (art.5 TEU) to ensure that national courts are reminded of their obligation not to issue decisions that actually or potentially contradict Commission decisions; (ii) ensuring that national judges can only apply the DMA against CPS providers that have been designated by a Commission decision as having a gatekeeper position and (iii) preventing access to courts for obligations which require a specification decision by the Commission. Moreover, the ADR option (in Article 33a) offers a faster and cheaper alternative to courts.

2.5.9 Article 38: Review

The Commission should be able to **add but also to remove obligations** if regulatory experience, market developments, or technological evolution make existing obligations either no longer relevant or no longer effective and proportionate in achieving market contestability and B2B fairness. Also, the review should be undertaken every 5 years instead of every 3.

Justification: The review of some obligations should be more 'symmetric' as regulatory experience and digital markets evolution may require that some obligations are added to the DMA, but also that some obligations are removed. Moreover, given the length and the complexity of the EU legislative process, such a "full review" should only be done every five years. To deal with the more rapid technology and market evolutions, our recommendations propose quicker but more limited adaptation clause with Article 6b (the more generic prohibitions) and Article 7 (possibility for the Commission of re-specify measures).

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